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WORKERS' COMPENSATION APPEALS TRIBUNAL

CHAIR'S RESPONSE TO ABC REVIEW QUESTIONNAIRE

SPECIAL NOTE: This Tribunal is funded by employer assessments through the WCB Accident Fund. No Consolidated Revenue Fund money is involved.

January 22, 1992

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The Management Board of Cabinet
Conseil de gestion du gouvernement de l'Ontario
Ontario

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Office of the Chair
Bureau du président

(416) 327-2020

December 11, 1991

MEMORANDUM TO: Agency Chairs

FROM: Tony Silipo
Chair

SUBJECT: Review of Agencies, Boards and Commissions

As you may know, Management Board has been assigned lead ministerial responsibility for a review of agencies, boards and commissions. This review is an important opportunity to examine new organizational models in light of demands being placed on government's regulatory and adjudicative function. The Review is also a timely method of improving the way we do business as we strive to meet our commitment to clients during a time of fiscal restraint.

At the moment a Steering Committee of concerned and knowledgeable individuals; representatives from both government and the agency community, is endeavouring to undertake this review. A list of Steering Committee members is enclosed for your information.

The Steering Committee quickly came to the conclusion that your ideas and expertise are critical to ensure a thorough and meaningful review process. Specifically, your perspective on how government can meet its regulatory commitments in creative, new ways is essential in determining where we go from here.

...../2

In seeking your opinion, we have designed a survey questionnaire which seeks to capture your views on current practices and possible options for improving client service, controlling costs and identifying savings in your agency or board. Your staff are certain to be interested in this review and I urge you to consult them throughout the review process.

I understand that this is a busy time of year. Nevertheless, I would appreciate your prompt attention in completing the enclosed questionnaire and returning it to Sandra Eckhardt, Project Manager, Management Board Secretariat, 6th Floor, Frost Building South, Queen's Park, by January 22, 1992.

Your co-operation in taking the time to provide the survey information is most appreciated. Should you have any questions regarding the questionnaire, please contact Sandra Eckhardt at (416) 327-2037.

Tony Silipo

Mr. Fred Peters
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Ministry of Labour
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Finance and Administration
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Mr. Todd Kilpatrick
Economist
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Mr. Jim Malcolm
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Ms. Sandra Eckhardt
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Management Policy Division
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Frost Building South, 6th Floor
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Assistant Deputy Minister
Corporate Services Division
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AGENCY REVIEW: A SYNOPSIS

Scope

The review will cover the government's advisory and regulatory agencies, boards and commissions to determine opportunities to eliminate overlaps and provide a strategy and options for achieving savings within this sector.

Method

The Steering Committee has developed a work plan based on terms of reference approved by Treasury Board. The work plan consists of applying three tests to the two agency groups: Test of Legitimacy; Test of Efficiency; Test of Cost Recovery. From these tests, strategies for achieving the review's objectives will be reported to Treasury Board with recommendations for realizing the review's objectives. The primary consultation method is focus groups, one each for agency chairs and deputy ministers.

Advisory Agencies

A questionnaire will be sent to Deputy Ministers covering issues related to the tests of legitimacy and efficiency, questioning the agency's apparent overlap with other agencies, impact on policy decisions, relationship to client groups, other consultation methods/strategies. Simultaneously, Management Board will review the sunset review status of each agency to compile a profile of that mechanism.

Regulatory and Adjudicative Agencies

Questions related to the test efficiency will ask agency chairs to: identify possible overlaps; redundancies between government bodies and professional groups; identify aspects of mandate no longer relevant or redundant in any way; state level of activity, volume of work; achievements made to regulatory industry. Those of cost recovery will question: cost of services; potential for greater cost recovery; compare fee schedules with those in other jurisdictions/agencies with like functions. Similtaneously, structural alternatives to the present adjudicative model used in Ontario will be identified and reviewed. Here the issues would be: duplication; integration; mediation as an alternative to adjudication. The "user-pay principle" as now applied in Ontario and in other jurisdictions would also be analyzed and considered in conjunction with the concept of compression.

QUESTIONNAIRE

REGULATORY / ADJUDICATIVE AGENCIES

This questionnaire is designed to obtain information and opinions related to the administration of regulatory and adjudicative bodies. Your input is needed to assess opportunities and develop strategies for improving service and cost effectiveness among regulatory bodies. These strategies have been requested by Treasury Board as part of its expenditure review process. Please complete all questions in Part "A" of the questionnaire and respond to questions in Part "B" as they relate to your agency. To meet the government's timetable for this review, please return your response by January 22, 1992, to Sandra Eckhardt; Management Policy Division; Management Board Secretariat; Frost Building South, 6th Floor; Queen's Park. Where space is insufficient on questionnaire please append your answer.

PART "A"

1. Name the agency that you chair:

_____

2. Is the function of the agency as described in "A Guide: Agencies, Boards and Commissions 1991" (published by the Public Appointments Secretariat and distributed to all ministers) accurate? If not, what has changed?

_____

_____

_____

_____

_____

3. Is the agency's function primarily regulatory or adjudicative:

Please describe:

_____

_____

_____

4. Are there aspects of the agency's mandate that need to be updated? If so, what needs to be changed? Are there barriers to making the change? Are there changes underway?

5. How many staff are dedicated to the agency and what is their status?

6. How do your cases arise? Check one or more, as appropriate.

complaint/applicant driven: ☐ referrals/appeals: ☐

licence applications: ☐ other sources: ☐ identify:

7. Please describe the process a typical case follows from receipt to final dispostion:

8. Does the agency have a fee schedule:

yes: ☐

no: ☐

If yes, what is it? If no, should it? Explain.

9. a] If the agency charges fees, what are its estimated revenues for 1991/92?

_____

_____

_____

Should these fees be realigned?

_____

_____

_____

b] What are its estimated expenditures for 1991/92, salaries and ODOE?

_____

_____

_____

10. What is the agency's date of inception?

_____

_____

11. In the past five years, has a policy review been undertaken to evaluate the agency's effectiveness, scope, structure, relevance, costs?

yes: ☐

no: ☐

If yes, please attach.

PART "B"

12. Identify the significant achievements the agency has made to regulated industry or client group in the past five years.

13. What opportunities are there for the agency to recover costs or generate revenue? What are the incentives or barriers to cost recovery or revenue generation?

14. **Is there any other agency involved in regulating/adjudicating the same or similar activities as your agency?**

15. a] Are there regulatory/adjudicative agencies which could be combined into one agency with a broader mandate?

b] Is the area of regulation/adjudication of your board/tribunal so specialized that it supports a unique agency?

yes: ☐

no: ☐

Are there other options?

16. Do professional or any other groups self-regulate within the agency's mandate to the effect that the client experiences delays?

17. Does the board/tribunal use a formal alternate dispute resolution mechanism?

yes: ☐

no: ☐

If yes, please describe.

18. If alternate dispute resolution is not a formal component of your process, what might be the difficulties in implementing a formal mediation process?

19. Is there a right of appeal on any basis to the decisions of your board/tribunal? Please describe the basis of possible appeal and where the appeal would be heard.

20. Please attach your most recent caseload analysis answering, as appropriate:

- number of cases received, by relevant case type;
- number of cases settled/withdrawn, by case type, prior to hearing and during hearing if this is a significant factor;
- number of cases heard, average case length (in number of hearing days), by relevant type of cases;
- by case type, length of time between application and first day of hearing;
- by case type, length of time between application receipt and final disposition.

_____

_____

_____

_____

_____

_____

_____

_____

21. Do you have a backlog situation?

yes: ☐

no: ☐

If yes, please describe.

_____

_____

_____

_____

_____

_____

_____

22. Are your adjudicators employed full-time, part-time or both? Please outline the numbers of adjudicators in each category and typical annual case loads.

23. Could money be saved by either the increased or decreased use of part-time adjudicators?

yes: ☐

no: ☐

If yes, what would be the difficulties with this?

24. Are cases heard by single adjudicators or by panels of adjudicators? If cases are heard by panels of adjudicators, could some of your cases be heard by single adjudicators? What might be the difficulties with this?

25. What is the ratio of support staff to adjudicators?

26. Do you have your own hearing rooms?

yes: ☐

no: ☐

If yes, how many and where? What is the rate of usage? If no, what are annual rental costs for hearing rooms?

_____

_____

_____

_____

_____

_____

_____

_____

27. Do you hold hearings in more than one city?

yes: ☐

no: ☐

If yes, where? Outline typical costs (including adjudicator travel):

_____

_____

_____

_____

_____

_____

_____

_____

_____

28. Do you hold hearings in French?

yes: ☐

no: ☐

If yes where? Outline typical costs:

_____

_____

_____

_____

_____

_____

_____

_____

29. Please describe the training you offer your adjudicators and list training budget (including French language training).

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

30. Do you use court reporters?

yes: ☐

no: ☐

If yes, please describe the frequency of use and typical costs. Is use of court reporters required by statute?

31. Please describe any special issues related to access by the public to your tribunal/board.

32. Where there is a family of interests among boards/agencies do you see opportunity for some sharing of comon services to administer, for example, training, computer technology, case management, office services? If so, to what extent? Should this sharing be within your ministry or across ministries?

33. Your further involvement in this review will be realized through a consultative process. What form would you prefer this process to take?

small focus groups: ☐
(based on family interest)

large forums: ☐

34. What would you do to achieve operational efficiencies and savings within your agency?

PART "A"

1. Agency name

Workers' Compensation Appeals Tribunal.

2. Agency's function

The 1991 Guide to Agencies Boards and Commissions describes this Tribunal's function as one of deciding appeals from WCB decisions. This description cover the Tribunal's main mandate. There are, however, other significant matters within the mandate.

The latter include: deciding whether personal-injury lawsuits are barred by the Workers' Compensation Act; dealing with questions of access to a worker's WCB file; deciding objections to employer-organized, worker medical examinations; and hearing appeals from Board decisions concerning employer assessments and the transfer of costs.

Proceedings may be brought by either a worker or an employer except in the last category of decisions in respect of which only an employer may appeal.

It is important in the context of this survey to appreciate, as well, that, unlike typical "appeals" in the judicial system, the appeals to the Tribunal are dealt with in hearings de novo, and - most significantly - that the Act gives the Tribunal an "inquisitorial" adjudicative responsibility. This latter responsibility requires the Tribunal to satisfy itself that in any particular case there is sufficient evidence for the hearing panel to be confident that it is making the correct decision. The statute specifically directs the Tribunal to make decisions on their "real merits and justice".

This responsibility is significantly different from that typically assumed by the courts - and by other adjudicators in our adversarial system of justice (including many adjudicative tribunals). Adversarial-style adjudicators are restricted to deciding cases on the basis only of evidence which parties to the dispute choose or are able to present.

The Tribunal exercises statutory investigative powers appropriate to its inquisitorial responsibilities, and its task is almost always complicated by the presence in the case of unrepresented interests. There is frequently, for example, no employer participating in the case, and the WCB does not appear in defence of its decisions.

It is also important to appreciate that the systemic role or function that is implicit in the Tribunal's statutory mandate goes beyond the correction of Board errors in individual cases. The compensation system and its clients depend substantially on the Tribunal appeal process for the clarification and resolution of generic legal or medical/scientific issues.

The Tribunal's inherent focus on problem cases, its advantage of being brought in at the end of a previous adjudicative process, its pre-hearing preparation and investigation, its hearing and post-hearing procedures with full opportunity for participation by interested parties, its fully reasoned and published decisions, its tripartite nature, and its independence from the WCB, are all aspects of the Tribunal and its work which contribute significantly to its role in clarifying and resolving systemic issues.

3. <u>Is the function regulatory or adjudicative?</u>

As described in No. 2 above, the Tribunal's function is adjudicative but the adjudicative responsibility is inquisitorial in nature. It should also be noted, however, that the Tribunal's adjudicative decisions can have a significant influence on the WCB's administration of the system, and so have a regulatory effect.

4. Mandate updates?

The Tribunal was created in 1985, and, in my opinion, there have been no serious mandate problems. There are significant ambiguities in some of the substantive provisions of the Workers' Compensation Act, but I do not interpret these as "mandate" problems.

The power of the Board of Directors to review Tribunal decisions in respect of issues of policy and general law of the Act under section 93 of the Workers' Compensation Act (R.S.O. 1990, chap. W.11) (the "Act") (previously section 86n) remains controversial within the worker community but has so far not proven to be an actual problem in its application.

There are a few powers that one might want to specify if the statute were open for revision in this respect, but there is nothing that the Tribunal isn't getting along without. Also, we are exploring the possible increased use of mediation in the resolution of cases, and there may prove to be a need for explicit statutory authority in that respect.

There is also a case to be made in one particular area for a reduction in the Tribunal's mandate. I refer to the rights of appeal given to workers in respect of Board decisions granting employer access to the worker's file. These decisions are made under section 71 of the Act (previously section 77).

Surprisingly, worker appeals from these decisions comprise about 20 per cent of the total number of the applications the Tribunal receives. They do not represent 20 per cent of our workload as we can deal with them fairly expeditiously, but the administrative and adjudicative burden is significant. The delays in the determination of a worker's or employer's rights are also substantial as the WCB's adjudicative processes are put on hold while the appeal is being processed.

Principles of natural justice require that parties to adjudication have access to all the relevant evidence filed with the adjudicators, and the opportunity to challenge that evidence. Subject to few exceptions, the law assumes, generally, that rights of privacy are waived once one subjects one's rights to adjudication. But workers and the worker community are instinctively hostile to the idea of an employer being given freedom of access to a worker's personal medical file. They are also often concerned with the potential for abuse of such information by the worker's employer or by members of the employer's staff.

Appeals from WCB decisions applying the well-established law appear to be brought as a matter of principle without much regard for whether there is any chance of succeeding in the appeal.

It also seems likely that these appeals are resorted to by some parties' representatives as merely a tactical measure when their client is in a position where a delay in the determination of the issues being adjudicated is to his or her advantage.

The result is that these appeals are almost always unsuccessful. I would estimate a denial rate in the order of 90 per cent or more. It is true that in a proportion of the decisions, a panel will impose special requirements of confidentiality on a employer as a condition of access, or delete irrelevant and particularly prejudicial material from the file, but rarely do these adjustments involve really serious matters.

In my opinion, the Act should be amended to make it clear that by the receipt of benefits under the Act workers are deemed to have agreed to allow employers access to any personal information collected by the Board which the Board considers relevant to any question or dispute about the benefits. Appeal rights in respect of access questions should be eliminated.

Such an amendment would have to be accompanied by amendments strengthening the Act's provisions regarding the employer's obligation to give such material confidential treatment - perhaps imposing significant fines, enforceable by the Board and on appeal by the Tribunal - and requiring that the nature of that obligation be specifically brought to the attention of employers and their staff whenever access to the material is allowed.

Protection of the parties from serious abuse by the Board of its powers in that respect would still be available through applications for judicial review to the Divisional Court.

I should in respect of this recommendation make it particularly clear that this is a personal recommendation by the Tribunal Chair with which his colleagues - particularly his worker member colleagues - are not necessarily in agreement.

I am, of course, aware of the special nature of the political problems inherent in any proposal for amendments to the Workers' Compensation Act. Such problems effectively preclude any mere tinkering with the Tribunal's legislative mandate and makes substantive changes such as the suggested amendments to section 71 a major undertaking.

It is important to realize, however, that rights are expensive, and that in this repressed economic climate ideal rights may be too expensive.

5. Numbers of staff

I assume that O.I.C. appointed adjudicators are not to be counted as staff. The breakdown of the staff complement is as follows:

Regular non-lawyer staff:	80
Staff Lawyers:	13
Unclassified contract staff:	9
Total	102

6. How cases arise

Our cases are appeals for the most part, and they are all initiated at the discretion of a worker or an employer. The one exception is reconsideration requests initiated by the Ombudsman.

7. <u>The agency's process</u>

The process from receipt to final disposition of a typical appeal is as follows.

Appeals are logged in by Records and forwarded to Intake - the department responsible for obtaining the worker's file from the WCB and other necessary preliminary information. Once Intake's work is complete, it forwards the file to the Tribunal Counsel Office where the case is prepared for hearing. The main vehicle in this regard is the Case Description ("CD") which summarizes the salient facts, identifies the probable issues, and provides an indexed copy of all relevant documents from the WCB file. Upon completion, the CD is forwarded to the WCB and to the worker and employer or their representatives who are free to request deletions, additions or amendments.

(The worker's consent to the employer having access to documents in his or her file is sought at the initial stages of an appeal. If the consent is withheld, the processing of the appeal is put on hold while the issue of the employer's right of access to relevant documents is decided by a Tribunal Panel. This is done in a special, parallel process.)

At the same time, the CD is sent to the Tribunal's Medical Liaison Office (MLO), to the Tribunal counsel assigned to assist with the case, and to the Scheduling Department. In the Scheduling Department, discussions concerning a hearing date are initiated immediately with the parties' representatives with a view to agreeing on a hearing date.

The MLO identifies medical issues in the case and checks the medical evidence available in the file and consults where necessary with the Tribunal's Medical Counsellors as to significant omissions or deficiencies. Problems with the medical evidence are addressed by further investigation, perhaps through seeking further information or clarification from doctors whose reports are to be found in the WCB file or by seeking additional advice or opinions from doctors on the Tribunal's roster of Order-in-Council appointed medical assessors. If this activity cannot be completed before the hearing date, the problem is brought to the attention of the Hearing Panel at the hearing and the Panel may direct post-hearing completion of such further investigation.

A hearing panel may, in any event, in the course of the hearing and decision-making process, identify for itself a need for further medical or other investigation. Where that happens, it will instruct the Tribunal Counsel Office to coordinate and direct that investigation, post hearing.

The results of any Tribunal investigations, whether post hearing or pre hearing, are, of course, shared with the parties who are entitled to make submissions in respect of them or, indeed, to respond with further evidence of their own.

It is usual for Panels to rely on written medical reports as sufficient indication of a doctor's evidence. However, where a report requires clarification or explanation the report's author may be required to testify and to be questioned about his or her report.

The Tribunal counsel investigates the law relating to an appeal and where necessary provides the Hearing Panel - and the parties - with copies of especially significant previous decisions of the Tribunal or of other authorities. He or she also assists with any need for further clarification of the issues likely to be addressed by a hearing panel and provides information to both party's representatives concerning the probable issue-agenda and the Tribunal's hearing process.

The CD, any additions to the CD requested by the parties, and any product of the pre-hearing work of the MLO or the Tribunal counsel is delivered to each member of the tripartite hearing panel a few days before the hearing date and is read by them in advance of the hearing.

At the hearing, any participating party is entitled to submit such further documentary evidence as he or she considers necessary and to have any witnesses testify. This is subject to the obligation to give the other party and the Tribunal three weeks' advance notice of such evidence. Witnesses may be cross-questioned by the other party or his or her representative and by any member of the hearing panel. It is usual for at least the worker to testify.

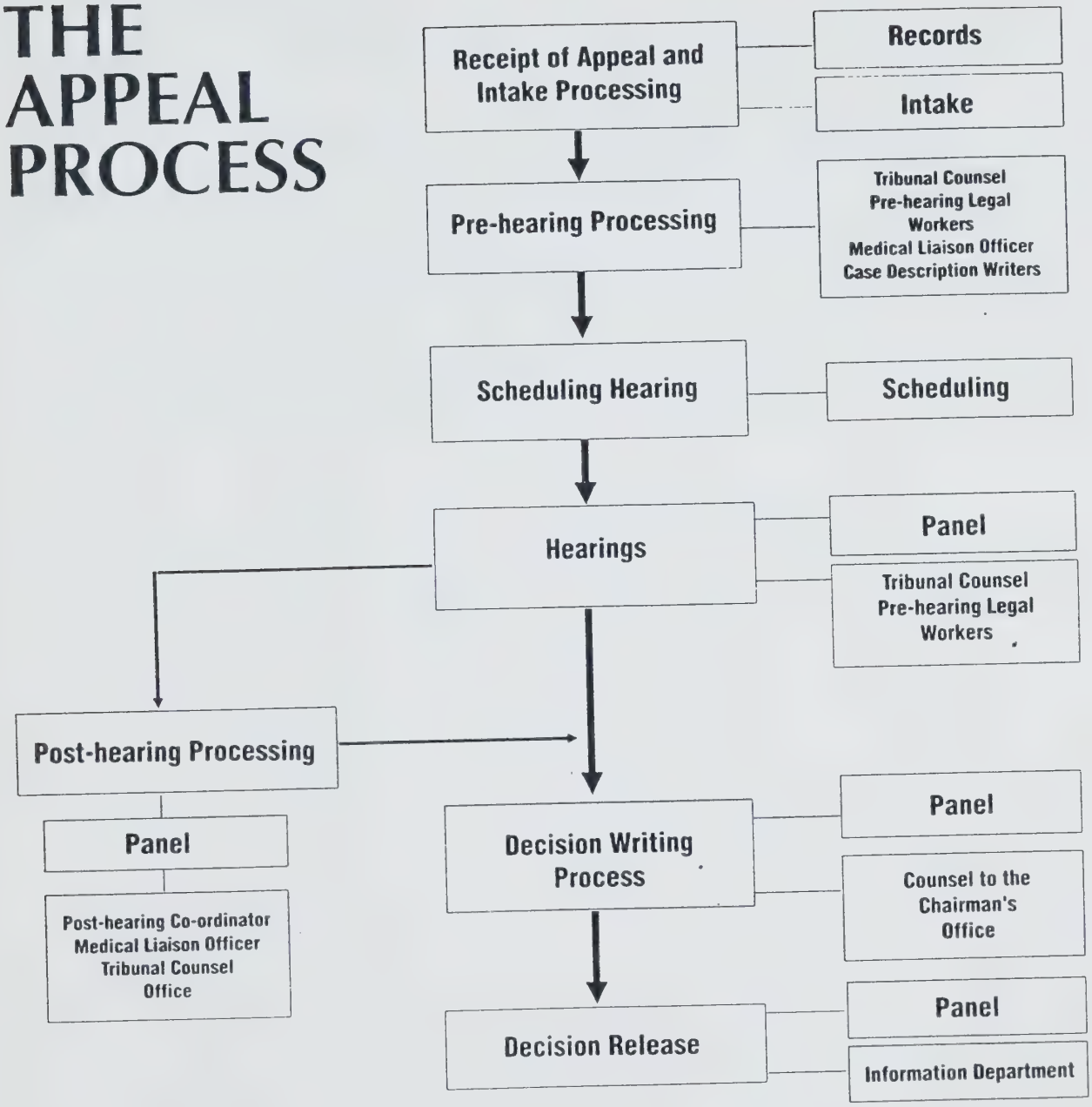
Once all of the evidence has been completed, submissions on the evidence and law are made and the hearing is then considered complete. The hearing is, however, always subject to being reconvened on the initiative of the hearing panel if the panel eventually concludes that additional evidence or further submissions are needed.

After the hearing, the decision is made through a process involving panel caucuses, drafting reasons, reviewing draft reasons, re-drafting, further caucuses, etc. The drafting of reasons is the responsibility of the panel chair but all three members of the hearing panel participate fully in the decision-making process. Frequently, draft decisions will be submitted to the Tribunal's draft review process prior to the decision being finalized.

After the decision is released, the Tribunal may receive a request for reconsideration, or be asked to respond to a complaint to the Ombudsman's Office, or the decision may become the subject of judicial review.

A diagram of the Tribunal's overall process is attached.

THE APPEAL PROCESS



8. Agency fee schedules

The Tribunal does not charge fees except for subscription fees for some of the publications produced by its information department.

In my opinion, a fee for accessing the Tribunal would not be appropriate. The bulk of the people initiating proceedings at the Tribunal are injured workers who have been unsuccessful in whole or in part with compensation claims at the WCB. In exchange for their rights under the Workers' Compensation Act - including, presumably, their access to the system's adjudicative processes - they have surrendered their access to the courts. In that sense, then, they have already paid for these privileges. They are also a group of people for whom a fee would often be a significant obstacle to access.

As far as employer access is concerned, again I do not believe a fee would be appropriate. The system, including this Tribunal, is already wholly paid for by employer assessments.

9. (a) Revenues from fees

The revenue from publication fees for 1991 (our fiscal period is the calendar year) was $60,000.

The amount of these fees is reviewed annually.

9. (b) Agency budget

The Tribunal's expenditure for the 1991 fiscal period for salaries, wages, benefits & ODOE was $10,650,000.

10. <u>Agency's date of inception</u>

October 1, 1985.

11. External reviews of effectiveness, scope, structure, relevance, costs

There have been two such reviews: A sunset review by Management Board in 1988 at the end of the Tribunal's first three years of existence and an outside consultant's review initiated by the Minister of Labour in 1989, as part of then Green Paper process on WCB issues. Copies of the relevant material are attached.

Management Board of Cabinet
Ontario

Application and Report to Management Board - MB20

(See instructions on reverse side)

1. Ministry LABOUR | 2. Ministry Reference # 1988/89-28 | 3. MBS Log #

4. Type of Request
- ☐ Certificate of Transfer
- ☐ Estimates
- ☐ Financial Transaction
- ☒ General
- ☐ Legislation
- ☐ Management Board Order
- ☐ Management Board Policy
- ☐ Order-in-Council
- ☐ Regulation
- ☐ Special Warrant

5. Purpose of Request / Action Proposed

Sunset review for the Workers' Compensation Appeals Tribunal as requested in the Management Board minute dated August 20, 1985.

6. Financial Implications

	($000's) 19 /	Year 2	Year 3	Matures in /
A. TOTAL COST OF PROPOSAL (B + C)	–			
B. EXISTING ALLOCATION RELATED TO PROPOSAL Salaries and Wages Capital Other Total (including all standard accounts)				
C. REQUIRED FOR REQUEST (change from existing allocation) Salaries and Wages Capital Other Total (A-B) (including all standard accounts)				
D. AVAILABLE EXPENDITURE OFFSET Salaries and Wages Capital Other Total (including all standard accounts)				
E. NET IMPACT ON MINISTRY ALLOCATION (C-D) Salaries and Wages Capital Other Total (including all standard accounts)				
F. REVENUE/COST SHARING RELATED TO REQUEST				
G. STAFFING RELATED TO REQUEST on March 31st person-years				

7. Management/Administrative Implications

Expected Results (information attached)	☒ N/A	☐ No	☐ Yes	
Evaluation Plan for New/Expanded Program (information attached)	☒ N/A	☐ No	☐ Yes	
Consultation with other Ministries	☒ N/A	☐ No	☐ Yes	if yes, which
Policy Recommended by Cabinet Committee(s)	☒ N/A	☐ No	☐ Yes	what Committee(s) Date: Date:
Administrative Data (information attached)	☒ N/A	☐ No	☐ Yes	
Workforce Impact (information attached)	☒ N/A	☐ No	☐ Yes	
Accommodation Implications	☒ N/A	☐ No	☐ Yes	
Financial Implications for Other Ministries	☒ N/A	☐ No	☐ Yes	if yes, which

8. Authorization/Date

1.12.88

Application and Report to Management Board - MB20

Administrative Data for Current Year (relates to 6C and 6D from page 1)

Vote & Item	Standard Account	MBO or Holdback	Funding Request ($000's) Expenditure Increase	Expenditure Decrease	Total
	Salaries & Wages				
	Employee Benefits				
	Transportation & Communication				
	Services				
	Supplies & Equipment				
	Acquisition/Construction of Physical Assets				
	Transfer Payments _____				
	_____				
	Other Transactions				
	Recoveries				
	Other Payments (specify) _____				
	Total				
	Salaries & Wages				
	Employee Benefits				
	Transportation & Communication				
	Services				
	Supplies & Equipment				
	Acquisition/Construction of Physical Assets				
	Transfer Payments _____				
	_____				
	Other Transactions				
	Recoveries				
	Other Payments (specify) _____				
	Total				
	Salaries & Wages				
	Employee Benefits				
	Transportation & Communication				
	Services				
	Supplies & Equipment				
	Acquisition/Construction of Physical Assets				
	Transfer Payments _____				
	_____				
	Other Transactions				
	Recoveries				
	Other Payments (specify) _____				
	Total				
	Salaries & Wages				
	Employee Benefits				
	Transportation & Communication				
	Services				
	Supplies & Equipment				
	Acquisition/Construction of Physical Assets				
	Transfer Payments _____				
	_____				
	Other Transactions				
	Recoveries				
	Other Payments (specify) _____				
	Total ☐ for activity ☐ for request				

WORKERS' COMPENSATION APPEALS TRIBUNAL

SUNSET REVIEW

I. RATIONALE FOR THE AGENCY

The Workers' Compensation Appeals Tribunal (WCAT) was established in October 1985 under the Workers' Compensation Act. The Tribunal replaces WCB's former internal Appeal Board as the final level of appeal to which workers and employers may bring WCB matters regarding entitlement to benefits, health care and vocational rehabilitation. It also decides appeals from WCB decisions on assessments, penalties and transfers of costs as well as disputes over employer access to workers' files and workers' objections to undergoing medical examinations requested by employers. In addition, the Tribunal decides if a person has the right to sue in court instead of making a compensation claim.

The Tribunal's Statement of Mission, Goals and Commitments is set out in Appendix "A".

II. STRUCTURE AND OPERATIONS

i) STRUCTURE

The Tribunal was established as a Schedule I (Anomalous) Regulatory Agency. The staff are not appointed under the Public Service Act.

The full-time Chairman of the Tribunal is S. Ronald Ellis. There are ten (10) full-time Vice-Chairmen, one of whom, Laura Bradbury, is the Alternate Chair. There are also twelve (12) full-time Members: six are Members representative of workers and six are Members representative of employers. In addition, there are also 38 part-time appointees serving as Vice-Chairman or Members representative of workers or employers.

The rates of remuneration for the Tribunal are:

Chairman		ECP 5 range
Vice-Chairman	Full-Time	ALR 23
	Part-Time	$350 per diem
Member	Full-Time	ALR 21
	Part-Time	$200 per diem

The Tribunal is supported by a staff of 84 regular and unclassified employees, and 23 full-time Order-in-Council appointees. There are, as well, 10 temporary employees on short-term contract (effective November 23, 1988).

A Memorandum of Understanding between the Chairman of the Tribunal and the Minister of Labour provides the division of responsibilities. The Ministry provides administrative advice and support services to the Tribunal upon request with respect to areas such as:

- office automation, telecommunications, computer systems and related technologies
- classification advice
- liaison with central agencies such as Management Board
- internal audit services

ii) OPERATIONS

The costs associated with the Tribunal are as follows:

	1986/87 Actuals	1987/88 Actuals	1988/89 Budget
Payroll	3,682.6	4,482.6	5,311.0
ODOE	2,025.4	2,896.2	3,070.0
Capital	559.7	1,549.6	450.0
TOTAL	6,267.7	8,928.4	8,831.0

The Tribunal's costs are not a charge on the Consolidated Revenue Fund but are paid by the WCB Accident Fund subject to budget approval by the Minister of Labour. The Tribunal's financial performance is subject to audit by the Provincial Auditor. The 1987/88 expenditures were audited by a public accounting firm recommended by the Office of the Provincial Auditor. The findings are expected shortly.

The activities of the Tribunal since it was established in 1985 are detailed below.

- The Tribunal issued 2,814 decisions during the three year period of this report.

In 1985/86, the Tribunal:

- received 2,550 cases and dealt with 650
- worked out the relationship with Government establishing a Schedule I (Anomalous) Agency
- released written decisions in which the Tribunal's jurisdiction was explicated and a myriad of difficult compensation issues were addressed for the first time in fully reasoned public decisions
- designed and implemented a new and novel adjudication process including principles such as:
  - the adjudication process must not be adversarial in nature
  - the hearing environment must reflect respect for the seriousness of the undertaking but not be intimidating to the workers or employers
- established an Advisory Group of representatives of worker and employer constituency organizations to provide a forum where information about the planning for the Tribunal could be shared
- commenced out-of-Toronto hearings (68 cases were heard out-of-Toronto)

In 1986/87, the Tribunal:

- introduced to its management structure a committee designed to enhance tripartite participation in the management of the Tribunal by neutral Vice-Chairs and representatives of workers and employers
- trained 33 new full- or part-time panel Members in hearings procedure and substantive legal and medical issues, and continued the education of existing Members and staff
- held 1,134 hearings and released 712 decisions
- 20% of hearings were held out-of-Toronto
- recruited the first group of medical assessors appointed under subsection 86h of the Workers' Compensation Act
- developed criteria for leave to appeal WCB Appeal Board decisions to the Tribunal
- completed hearings in the Pensions Leading Case

- defined guidelines for employer access to workers' files and medical records, and for employer-ordered medical examinations of workers

- organized public distribution of fully-indexed significant Tribunal decisions, developed electronic access to all Tribunal decisions, and published a newsletter five times to update information about Tribunal Members, staff, administration, procedures and decisions

- established a library collection of books, journals and files available to staff, panel Members and parties.

In 1987/88, the Tribunal:

- issued Decision No. 915 on the subject of chronic pain. This was the culmination of the Tribunal's Pension Assessment Appeals Leading Case strategy.

- trained 12 new full- or part-time panel Members in hearings procedure and substantive legal and medical issues, and continued the education of existing Members and staff

- held 1,215 hearings and released 1,174 decisions

- recruited second round of medical assessors

- continued to increase its ability to provide services in the French language, receiving approval for its plan to implement the French Language Services Act

- continued to recognize an institutional responsibility to assist the employer and worker communities in understanding the Tribunal's role and operation, and accepted invitations to speak at conferences and meetings and participate in seminars and workshops

- installed a computer to provide an automated office and information system

- worked towards the development of the computerized Case Management Program, which will be implemented as a pilot project

In 1988/89, the Tribunal plans to:

- develop appropriate strategies and mechanisms to deal with incoming cases on a 4 month overall turnaround average

- implement a case management tracking system of the files

- finalize plans for the implementation of the French Language Services Act, November 1989
- seek to eliminate remaining backlogs
- initiate a base-budget review process to prepare the 1989 calendar year budget

Summary January to November 18, 1988

- 1,218 decisions issued
- 982 hearings held - 782 in Toronto (79.6%) and 200 out-of-Toronto (20.4%)

III. DUPLICATION/OVERLAP

There is no duplication or overlap of jurisdiction. There is, however, some uncertainty regarding the resolution of differences of opinion between the Tribunal and the Workers' Compensation Board.

IV. REQUIREMENTS FOR CHANGE

Ministry of Labour officials will review the claims and adjudicative process of the province's workers' compensation system in a forthcoming discussion paper to be produced in 1989.

V. MINISTER'S RECOMMENDATION

The Minister recommends that the mandate of the Tribunal be continued.

Upon reviewing the forthcoming discussion paper, the Minister will make appropriate recommendations concerning jurisdictional matters.

Nov 30/88
DATE

CHAIRMAN, WCAT

DATE

MINISTER OF LABOUR

APPENDIX

WORKERS' COMPENSATION APPEALS TRIBUNAL

STATEMENT OF MISSION, GOALS AND COMMITMENTS

October 1, 1988

WORKERS' COMPENSATION APPEALS TRIBUNAL

Statement of Mission, Goals and Commitments

THE MISSION

In its most fundamental terms, the Tribunal's mission is to perform appropriately the duties assigned to it by the Workers' Compensation Act.

These duties are both explicit and implicit. The explicit assignments define what the Tribunal must do and are, generally speaking, clear. They need not be repeated here.

The implicit obligations identify the manner of the Tribunal's operations. By definition, the nature of those obligations is subject to interpretation and debate, and it is important that the Tribunal's perceptions in that respect be known.

The implicit statutory obligations as the Tribunal understands them may be usefully described in the following terms.

1. The Tribunal must be competent, unbiased and fair-minded.

2. The Tribunal must be independent.

   The obligation to be independent has three essential facets:

   (a) The maintenance of an arms-length, independent relationship with the Workers' Compensation Board.

   (b) A commitment by the Chairman, Vice-Chairs and Members to not being inappropriately influenced by the popular views of workers or employers.

   (c) A commitment by the Chairman, Vice-Chairs and Members to being undeterred by the possibility of government disapproval.

3. The Tribunal must utilize an appropriate adjudication process. To be appropriate, the Tribunal believes the process must generally conform with the following basic concepts:

   (a) The process must be recognized as not being an "adversarial" process as that concept is generally understood in a common-law context.

   (Unlike a court, the Tribunal is not engaged in resolving a contest between private parties. Appeals to the Tribunal represent a stage in the workers' compensation system's investigation of the statutory rights and benefits flowing from an industrial injury.

It is a stage of the system's process that is invoked on the initiative of a worker or employer but in this stage, as in earlier stages of the process, it is the system and not the worker or the employer which has the burden of establishing what the Act does or does not provide with respect to any reported accident.

The fact that it is the system which has the primary responsibility in this respect is reflected in the Board's and the Tribunal's explicit investigative mandates and their respective statutory obligations to decide cases on the basis of their "real merits and justice".

In legal terminology the process may be characterized as an "inquisitorial" as opposed to an "adversarial" process.

Despite the non-adversarial or inquisitorial nature of the process, it is a fact that the Tribunal's hearings normally take much the same form as do hearings in a typical adversarial process. To the uninitiated, the use of what is essentially an adversarial hearing format is confusing as to the fundamental nature of the Tribunal's process. In fact, however, the adversarial format merely reflects the Tribunal's tacit recognition that the participation of the parties in that manner will meet expectations in that regard and will, as well, be usually both the most effective and the most satisfying way for parties to, in fact, contribute to the Tribunal's search for the real merits and justice.

The Tribunal's commitment, in a non-adversarial process, to an essentially adversarial hearing format is also bolstered by its appreciation of the Canadian legal system's concept of what constitutes a "hearing". The legal system's understanding of the principles of natural justice that apply where there is, as there is here, a right to a hearing, are such that even in a non-adversarial process the style of hearing would not in law be allowed to stray far from the basic adversarial format.)

(b) The non-adversarial nature of the process in which the Tribunal is engaged evokes the following three, particularly significant special process imperatives.

(i) The Tribunal's hearing panels have a responsibility to take such steps as they may find necessary to satisfy themselves that in any particular case they have such reasonably available evidence as they require to be confident as to the actual merits and justice in that case.

(ii) The issue agenda in any case must ultimately be determined by the hearing panels and not dictated by the parties.

(iii) The manner of conducting a hearing, while usually to be governed by rules and format of a standard nature, must be adaptable to the special hearing needs of any particular case as the hearing panel in that case may consider necessary or appropriate. Any such adaptations must, however, be consistent with a fair hearing and reflect proper regard for the integrity of general Tribunal rules and procedures that are conducive to effective and fair process from an overall perspective.

(c) The adjudication process must be effective and fair from the parties' perspective.

It must allow the parties timely knowledge of the issues, a fair opportunity to challenge or add to evidence and/or to provide their own evidence, and a fair opportunity to advocate their views and to argue against opposing views.

(d) The process must also be effective from the perspective of the Tribunal.

It must provide the Tribunal's panels with the evidence, the means of evaluating the evidence, and the understanding of the issues, which will permit them to decide with confidence on the real merits and justice of the case.

(e) The process should not be more complicated, regulated, or formal (and, thus, not more intimidating to lay participants) than the requirements of effectiveness and fairness and the needs of reasonable efficiency dictate.

(f) In the post-hearing phase, the decision-making process must provide full opportunity for effective tripartite decision-making and for the careful development of appropriate decisions.

To be appropriate, decisions must be written and fully-reasoned. They must conform to the rule of law and meet reasonable, general standards of decision quality. Applicable law must be given its due effect and the principles adopted in other Appeals Tribunal decisions must be shown appropriate deference. The goal of achieving like results in like fact situations must be sensibly pursued.

4. The process for dealing with applications, as distinguished from appeals, while conforming generally with the foregoing, must be subject to such variations as the special statutory provisions governing each of the various applications may anticipate.

5. The Tribunal must hold hearings and reach decisions in as timely a fashion as is reasonably possible given the foregoing process obligations.

6. The Tribunal must make all its decisions readily accessible to the public.

7. The Tribunal's services must be reasonably accessible in both the French and English languages.

GOALS

In pursuing its mission, the Tribunal has adopted the following specific goals.

1. Achieving a total case turnaround time from notice of appeal or application to final disposition that averages four months, and in individual cases, unless they are of unusual complexity or difficulty, does not exceed six months.

2. Providing a system which can, so far as is reasonably possible, meet the various implicit statutory imperatives regardless of the experience or capabilities in a particular case of the worker's or employer's representative, or the absence from the process of any party or representative.

3. Maintaining at all points of contact between the Tribunal and workers and employers and their representatives a welcoming, empathetic, non-intimidating and constructive professional environment -- an environment grounded in implicit respect on the part of all Tribunal staff and members for the goals and motives of workers and employers involved in the Tribunal's processes and for the importance of the Tribunal's work on their behalf.

4. Maintaining a working environment for Tribunal staff that provides both challenging work and suitable opportunities for personal recognition, development and advancement, in an atmosphere of mutual respect.

5. Maintaining at all times a sufficient complement of qualified, competent, trained and committed Vice-Chairs and Members.

6 Maintaining at all times a sufficient roster of qualified and committed medical assessors.

7. Maintaining at all times a sufficient complement of qualified, competent, trained and committed administrative and professional staff.

8. Providing the physical facilities, equipment and administrative support services necessary for the Vice-Chairs, Members and staff to perform their responsibilities efficiently and in a manner which is conducive to job satisfaction and consistent with professional expectations.

9. Within such restrictions as may be implicit in the Chairman's statutory obligation to take as his or her guidelines in the establishment of job classifications, salaries and benefits the administrative policies of the Government, compensating staff fairly and competitively relative to their responsibilities and the nature of their work.

10. Maintaining a constructive and appropriate working relationship with the medical profession and its members, generally, and with the Tribunal's medical assessors, in particular.

11. Maintaining a constructive and appropriate working relationship with the Board and its staff and with the Board's board of directors.

12. Maintaining a constructive and appropriate working relationship with the Minister and Ministry of Labour and with such other components of the government structure with which the Tribunal has dealings from time to time.

13. Providing the public and, in particular, workers and employers and their respective communities and representatives with such information about the Appeals Tribunal and its operations as is necessary for the effective utilization of the Tribunal's services.

COMMITMENTS

In the performance of the Tribunal's Mission and in the pursuit of its Goals, the Tribunal has recognized a number of matters to which it is effectively committed.

1. The Tribunal is committed to keeping the investigative and pre-hearing preparation activities of the Tribunal separate from its decision-making activities.

   This is accomplished by means of a permanent department of full-time professional staff (the TCO). TCO's assignment in this regard is to perform the Tribunal's investigative and pre-hearing preparation work. This work is to be performed in accordance with general standing instructions of the Tribunal. In individual cases where pre-hearing investigation or preparation requirements appear to exceed such standing instructions, TCO will act in accordance with special instructions from Tribunal panels -- panels whose members are not thereafter permitted to participate in the hearing and deciding of such cases.

2. The Tribunal is committed to Tribunal-monitoring, at the pre-hearing stage, of the identification of issues and the sufficiency of evidence.

As part of the commitment to separation of pre-hearing investigation and preparation activity from decision-making activity, this monitoring is normally carried out by the TCO pursuant to Tribunal instructions delivered in the manner described above.

(This commitment does not preclude variable strategies concerning the degree of pre-hearing monitoring and the amount of TCO initiative in the pre-hearing preparation, with respect to different categories of cases. It also contemplates the possibility of TCO not monitoring particular categories of uncomplicated cases.)

It is, of course, understood that the TCO's pre-hearing role does not diminish in any way the hearing panels' intrinsic rights and obligations in the hearing and determining of individual cases. Hearing panels have the final say in the identification of issues and, at a mid-hearing or post-hearing phase, the right to initiate and supervise the development or search for additional evidence, or to obtain further legal research or request additional submissions.

3. The Tribunal is committed to having the Tribunal represented by its own counsel at any Tribunal hearing where the Tribunal considers such representation necessary or useful.

4. In its internal decision-making processes, the Tribunal is committed to the maintenance of a tri-partite working environment characterized by mutual respect and by free and frank discussions based on non-partisan, personal best judgements from all panel members.

5. The Tribunal is committed to maintaining internal educational processes suitable for developing a Tribunal-wide, comprehensive appreciation of the nature and dimensions of emerging, generic, medical, legal or procedural issues.

6. The Tribunal is committed to the establishment and maintenance of a general workers' compensation information resource and library.

   This resource and library is to be a sufficient and effective source of legal, medical, and factual information relevant to the workers' compensation subject. It shall provide access to information which is not conveniently assembled elsewhere, and which workers and employers, members of the public, professional representatives, and Members and staff of the Tribunal require if they are to truly understand the workers' compensation system and the issues which it presents, or be able to prepare on a fully informed basis for presenting or dealing with such issues in individual cases.

   This information is to be readily accessible through electronic and other means.

7. The Tribunal is committed to the creation of a permanent, widely distributed and easily accessible, published record of the Tribunal's work.

   This record is to consist of the selection of Tribunal decisions best calculated to assist worker or employer representatives to understand, in the preparation of their cases, workers' compensation issues and the Tribunal's developing position on such issues.

8. The Tribunal is committed to the review by the Chairman, or by the Office of the Counsel to the Chairman, of draft panel decisions.

   This review is conducted for the purpose of ensuring -- to the extent possible given the overriding hearing-panel autonomy -- that the Tribunal's body of decisions complies reasonably with the general hallmarks of quality which the Tribunal has recognized.

9. The Tribunal is committed to devoting its best efforts to having Tribunal decisions comply reasonably with the following hallmarks of a good-quality adjudicative decision:

   (a) It does not ignore or overlook relevant issues fairly raised by the facts.

   (b) It makes the evidence base for the panel's decisions clear.

   (c) On issues of law or on generic medical issues, it does not conflict with previous Tribunal decisions unless the conflict is explicitly identified and the reasons for the disagreement with the previous decision or decisions are specified.

   (d) It makes the panel's reasoning clear and understandable.

   (e) It meets reasonable standards of readability.

   (f) It conforms reasonably with Tribunal standard decision formats.

   (g) From decision to decision the technical and legal terminology is consistent.

   (h) It contributes appropriately to a body of decisions which must be, as far as possible, internally coherent.

   (i) It does not support permanent conflicting positions on clear issues of law or medicine. Such conflicts may occur during periods of development on contentious issues. They cannot be a permanent feature of the Tribunal's body of decisions over the long term.

   (j) It conforms with applicable statutory and common law and appropriately reflects the Tribunal's commitment to the rule of law.

(k) It forms a useful part of a body of decisions which must be a reasonably accessible and helpful resource for understanding and preparing to deal with the issues in new cases and for invoking effectively the important principle that like cases should receive like treatment.

10. The Tribunal is committed to obtaining in each case such reasonably available evidence as its hearing panels require if they are to be confident as to the appropriateness of their decision on any factual or medical issue.

11. The Tribunal is committed to holding hearings at appropriate out-of-Toronto locations.

    The commitment in this respect is that cases originating out of Toronto should be heard at locations which are reasonably convenient from both the worker's and employer's perspective. This commitment is subject to the limit of not imposing travel obligations on Tribunal members or administrative burdens on the Tribunal so onerous as to interfere with the effective operation of the Tribunal in other respects.

12. The Tribunal is committed to the payment of expenses and compensation in respect of lost wages arising from attendance at Tribunal hearings in accordance with the WCB's policies in that regard with respect to attendance at WCB proceedings.

13. The Tribunal is committed to paying for medical reports which serve a reasonable purpose in the Tribunal's proceedings.

14. The Tribunal is committed to being fiscally responsible in the management of its expenditures to the end that only moneys necessary for the performance of the Tribunal's mission and the accomplishment of the Tribunal's goals are, in fact, spent.

This document reflects the Tribunal's Mission, Goals and Commitments as at least implicitly understood from the Tribunal's inception.* Their expression in these particular terms was approved by the Tribunal as of October 1, 1988.

S. R. ELLIS
Chairman

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*The single exception is Goal No. 1. The original turnaround goal was six months.

F

WORKERS' COMPENSATION APPEALS TRIBUNAL

Memorandum

TO: All full-time and part-time Vice-Chairs, Members and Staff

FROM: S. R. Ellis, Chairman **DATE:** May 16, 1990

RE: The Coopers & Lybrand Review of the Tribunal

As most of you will know, the consulting firm of Coopers & Lybrand was commissioned in the spring of 1989 by the previous Minister of Labour to review the Tribunal and to report on its efficiency and effectiveness. The Minister had initiated what was called a "Green Paper" study of a number of issues related to the workers' compensation system which had been of ongoing interest to either the worker or employer communities. One of these issues was the workers' compensation system's adjudication processes, and the Minister felt the need for assisting the Green Paper process by an outside review of the various components of those processes.

The study of the Appeals Tribunal was done in the summer and fall of 1989 and consisted of the Consultants' team interviewing a large number of individuals with personal experience of the Tribunal's work, both inside and outside the Tribunal. The Review's findings consist of the team's summary of the gist of those interviews. Its conclusions and recommendations are based on or reflect the team's reaction to the information and opinions obtained in those interviews.

The Review is now complete and was delivered to the Tribunal by the Minister on May 15. It will be available to the public on Thursday, May 17. For your information, I enclose a copy of Coopers & Lybrand's Executive Summary of its Review, together with copies of the Minister's letter to me and my response to him. I would appreciate your keeping the content of the review confidential within the Tribunal until Friday of this week. Copies of the full report will be available in the Library on Friday.

We are planning to reserve the Assembly meeting on Wednesday, June 6, for a full discussion of the Review. In the meantime, any questions from people outside the Tribunal

for comment on the Report should be referred to Eleanor Smith. Outside requests for copies of the Report should be referred to Judith Skuce at the Ministry of Labour, 326-7649.

Attachments

Ron.

Ontario Ministry of Labour
Ministère du Travail de l'Ontario

Office of the Minister
Bureau du Ministre

400 University Ave.
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M7A 1T7
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WORKERS' COMPENSATION
MAY 15 1990
APPEALS TRIBUNAL

May 10, 1990

Mr. S.R. Ellis
Chair
Workers' Compensation Appeals Tribunal
7th Floor
505 University Avenue
Toronto, Ontario
M5G 1X4

Dear Ron,

With this letter I am enclosing the final report on the review of the appeals process of the Workers' Compensation Appeals Tribunal (WCAT), which was conducted by the Coopers and Lybrand Consulting Group for the Ministry of Labour. As you know, this report was commissioned last year as part of background research for the planned green paper on workers' compensation. I intend to transmit the report to members of the External Advisory Group (EAG) who continue to provide me with advice on the green paper.

I am pleased to note that the consultants concluded that the WCAT has achieved a high degree of both operational efficiency and overall effectiveness, and has contributed to improvements in the workers' compensation system.

The consultants have also raised some specific concerns about WCAT operations, and suggest that attention to these will help the WCAT maintain the credibility and support it currently enjoys in the workers' compensation community.

Since the majority of the report's recommendations refer to the internal operations of the Tribunal, I am referring the report to you for your consideration and response.

Two aspects of the report will be addressed by the Ministry of Labour because they potentially require the

consideration of legislative change. The first item of direct interest to the Ministry is the review mechanism established in section 86n of the Workers' Compensation Act. The consultants' report addresses this subject and the Ministry's Green Paper will provide a detailed discussion of the issues of accountability and independence raised by section 86n. The Green Paper will also discuss a range of optional alternatives to this provision.

Another of the report's recommendations concerns potential changes in the method by which sidemembers and other Order-in-Council (OIC) appointees are nominated to the Tribunal. The Ministry will also consider the consultants' proposals for changing the duration of the terms of the OIC appointees.

The Ministry intends to consult with both the Tribunal and the communities of interest before considering any changes.

I look forward to further discussions with you about the recommendations in the consultants' report.

Yours sincerely,

Gerry

Gerry Phillips
Minister

Enclosure

Ontario

Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

505 University Ave.
7th Floor
Toronto, Ontario
M5G 1X4

Office of the Chairman

TEL: (416) 598-4638
FAX: (416) 979-8324

May 15, 1990

The Honourable Gerry Phillips
Minister of Labour
14th Floor
400 University Avenue
Toronto, Ontario
M7A 1T7

Dear Minister,

Re: Coopers and Lybrand Report

May I acknowledge receipt of the Tribunal's copy of the Coopers and Lybrand Report and thank you for your covering letter.

I am pleased to see that the Report effectively confirms that, overall, the Tribunal's mandate has been interpreted appropriately and met successfully. My colleagues and I will take particular pleasure in the Report's findings concerning the Tribunal's high degree of operational efficiency and effectiveness and the respect accorded its decisions by both the worker and employer communities and by the Board.

A number of the changes which the Report proposes we are already in the midst of accomplishing; there are other recommendations that we will have no difficulty in accepting, and some that are clearly worthy of serious consideration. I do have a concern about the currency of some of the findings and about the strategic implications of a number of the suggestions relating to structural changes in the Tribunal's organizational and process arrangements, and I will address those in due course.

One matter I believe it would be wise to clarify immediately is the indication in the Report that it would be lawful for the Tribunal to refuse or limit an employer's participation in a worker's appeal or a worker's participation in an employer's appeal. The Report suggests that permitting full participation by the other party was a discretionary policy decision of the Tribunal's that was inconsistent with its general commitment to a non-adversarial

hearing process and one which has contributed unnecessarily to what is seen to be an undesirably adversarial hearings environment.

You should know, in this respect, that the Tribunal has been of the view from the outset that, policy considerations aside, it had no option in this area. It has been our opinion that the provisions of the Act combined with well-established principles of administrative law give the employer and the worker a right of equal participation in the other's appeal. The Tribunal has had no occasion to formally consider the point in the context of a hearing, but that has been the view of the law on which we have proceeded.

The Tribunal's processes for addressing these various matters and deciding what ought to be done will now begin and I will be reporting to you in due course as to the nature of those processes and their results. I have no doubt that these processes will include an opportunity for an exchange of views with our Advisory Group.

There are also, of course, recommendations which are properly within your jurisdiction rather than mine, and I look forward to contributing to your deliberations in respect of those matters at your convenience.

Yours very truly,

ORIGINAL SIGNED BY
S. R. ELLIS

S.R. Ellis
Chairman

dj

copy: George Thomson

EXECUTIVE SUMMARY

The Coopers & Lybrand Consulting Group has now completed a review of the efficiency and effectiveness of the Workers' Compensation Appeals Tribunal (WCAT). This review, which took place between July and November, 1989, examined the Tribunal's caseload management system, and assessed WCAT's effectiveness in terms of management and adjudicative decision-making, fulfilment of its mandate and its impact on the workers' compensation system overall.

WCAT has achieved a high degree of both operational efficiency and overall effectiveness, and has contributed to improvements in the workers' compensation system. Specific concerns about WCAT operations have been raised and addressed in the course of the review. Attention to these concerns will help WCAT maintain the credibility and support it currently enjoys in the workers' compensation community.

The Efficiency of WCAT's Caseload Management Process

A statistical review of WCAT's caseload management revealed that the incoming caseload has decreased and stabilized since the initial influx of cases. WCAT's incoming caseload is expected to rise significantly, beginning this year, with the passage of Bill 162 amendments to the Workers' Compensation Act. The majority of WCAT cases may be classified as "entitlement" cases; about one-third are "special section" cases.

WCAT has shown a steady increase in its capacity to dispose of cases, and is making progress in decreasing its caseload backlog. In January, 1989, WCAT began to phase in modifications to its processing procedures in an attempt to meet an overall average of four months for disposing of individual cases. The most significant reduction in processing time has been at the decision-writing stage. Significant exceptions to the four-month timetable, however, have meant that the average has been calculated by combining shorter-term special section cases with longer-term cases, like those requiring medical or legal input or originating from outside Toronto. WCAT's approach to an "average" processing goal has raised expectations among entitlement appellants that WCAT has been unable to fulfil.

An assessment of WCAT's performance on a four-month goal (according to either WCAT's definition, or the more commonly-understood average for entitlement cases) is made difficult by WCAT's data-collection methods. WCAT cannot track individual cases through the system, and can only provide snapshots of caseloads at various points in the system. An analysis of this information indicates that the majority of cases are not disposed of within four months. This is partly because a large group of cases, caused by the adoption of new procedures, is working its way through the system. This group is currently causing delays in scheduling and is expected to cause backlogs in decision-writing for some time to come. The system currently appears to be near its limit; any significant increase in incoming cases will threaten future achievement of a four-month goal.

It is recommended that WCAT set clear, achievable turnaround goals for each category of case, rather than rely on an overall average. This will enable the Tribunal to monitor achievement more accurately and manage appellants' expectations more effectively.

It is recommended that WCAT develop a strategy for bringing out-of-Toronto case processing times in line with Toronto cases. This will anticipate the rising demand of these cases and promote greater fairness in case disposition.

It is recommended that WCAT develop an information technology strategic plan which provides for increased hardware capacity and implementation of caseload management software capable of tracking individual cases. This will improve WCAT's capacity for monitoring and adjusting performance throughout its caseload management system.

It is recommended that WCAT increase its full-time Vice-Chair resources, either through additional appointments or shifting resources currently devoted to part-time Vice-Chair appointments.

A greater number of full-time Vice-Chairs will provide greater speed, flexibility and expertise in caseload management.

The Effectiveness of WCAT's Management Structure

An examination of WCAT's internal management found weaknesses in the current performance management system, which is based mainly on quantitative measures. This approach may be contributing to delays if quality is sacrificed because of quantitative performance pressures. The review also identified problems with WCAT's senior management decision-making structure resulting from multiple layers of authority and lack of clear definition of responsibility.

It is recommended that WCAT develop a performance management system based on both qualitatively and quantitatively measures.

It is recommended that WCAT choose from among several options for simplifying its current senior-management decision-making process. These options will eliminate the current policy committee structure, streamline and clarify lines of authority and free panel-members for their adjudicative duties.

WCAT's Effectiveness in Fulfilling Its Mandate

WCAT was part of a reform movement, aimed at solving systemic problems in workers' compensation, including lack of credibility in decision-making, the inability of the Workers' Compensation Board (WCB) to effectively challenge its own decisions, and the need for decisions to more clearly reflect the statute. WCAT has designed its adjudication processes and overall approach in order to fulfil these expectations of change. In general, WCAT has been successful in fulfilling its mandate, though some specific concerns remain regarding aspects of WCAT's operations.

WCAT's approach has included a comprehensive interpretation of its mandate for independence from the WCB, government, the partisan communities and review processes. While the employer community and the WCB have some concerns about the extent of WCAT's independence, the worker community is generally supportive.

WCAT has taken an appropriate position of independence from WCB in terms of its powers to interpret the Act and assess Board policy. The exception to this is WCAT's leading case strategy, which trespasses on the Board's

jurisdiction as policy-maker. It is recommended that WCAT discontinue the practice of selecting leading cases to set precedent on issues of statutory interpretations. By remaining within its jurisdiction over individual appeals, WCAT can make an effective contribution to the policy process through the cumulative weight of its jurisprudence.

WCAT's attempt to remain independent from the partisan politics of workers' compensation is prudent but, after a point, impractical. WCAT must be seen as fair and impartial, but cannot avoid the legitimate demands of the worker and employer communities for input into the system. It is recommended that WCAT reactivate the bipartite Advisory Group as a forum for meaningful consultation and advice on WCAT's operations, and work with the communities to find appropriate solutions to perceived problems.

WCAT has taken an appropriate position that it is not responsible for considering the fiscal or administrative impact of its decisions on the workers' compensation system. This is the Board's area of responsibility; WCAT is responsible only for determining the validity of individual claims.

WCAT has taken an appropriately strict approach to requests for reconsideration of its decisions by parties and the Ombudsman. The importance of finality in the system justifies this approach; the high quality of WCAT decisions makes it fair and reasonable.

WCAT's broad approach to independence must be balanced by proper accountability, to ensure that the system remains open and responsive to change. Current accountability mechanisms are appropriate, but concerns have been raised by the employer community that they are not sufficient. Options to increase accountability without hampering WCAT's independent decision-making include: modifying the Legislative Committee structure to provide for a greater investigatory role; conducting regular operational reviews; and modifying the budget approval process to put it under the purview of Management Board of Cabinet.

The non-advocate design of WCAT's tripartite system has contributed to its mandate by avoiding party polarization and encompassing objective, responsible decision-making. Panel sidemembers, however, cannot be neutral in the manner of Vice-Chairs. They must remain representative of, and accountable to their communities, while retaining their independence as adjudicative decision-makers. Greater involvement of stakeholders in the appointment process will help maintain the confidence of the communities. Another option is to limit sidemembers to one term to ensure currency. Further options include making sidemembers' representative role more explicit within the hearing itself, and expanding the approach to articulating partial dissents or clarifications. Finally, institutional mechanisms should be developed to ensure that sidemembers maintain a regular contact with their communities. These measures would not threaten

WCAT's consensual, non-partisan tripartite system, but would ensure that sidemembers are truly "representative of" their communities.

WCAT's model of appeal is close to a de novo approach; that is , hearing a case as if for the first time. This is generally consistent with the Act and with WCAT's mandate for independence. WCAT has been criticized, however, for taking too broad an approach to determining the issues-agenda in individual cases, adding to the down-side risk of appeal and contributing to high costs and delays in case preparation.

It is recommended that WCAT elaborate its reasons in each case where it seeks to alter the issues-agenda from the parties and the Boards perspectives, and provide for a temporary adjournment. Moving closer to a "re-hearing" model of appeal will increase predictability and consensus in determining the issues of a case.

WCAT's Effectiveness as a Decision-Maker

The review assessed WCAT's effectiveness as a decision-maker from both the parties' and the Tribunal's perspectives, and in terms of both process and results. It found that WCAT renders high-quality adjudicative decisions which are; fair, balanced, consistent and fully-reasoned.

Some concerns were raised about the Tribunal's quality-control mechanisms in its use of medical evidence and resources. It is recommended that WCAT adjust its procedures to ensure that panels have access to the highest-quality medical evidence and to expert medical counsel before and during hearings, and that the post-hearing medical review role be more clearly incorporated as a quality-control mechanism.

Concerns were also raised that the style of WCAT's written decisions is overly complex and legalistic. It is recommended that WCAT develop style guidelines, provide training to Vice-Chairs and retain the services of an editor to ensure that decisions communicate to their range of audiences. Further options include providing a precis of full decisions or an interpretive service for parties.

Two major process issues have been the focus of criticism of WCAT; that the Tribunal's process is ponderous and overly legalistic; and that panels do not have sufficient control over the decision process because of the role of staff. The former criticism is difficult to assess, but remains an overwhelming perception of WCAT's operations. The challenge of WCAT will be to respond to the needs of parties and find the blend of flexibility and fairness which will make it both accessible and credible.

WCAT's process should remain consistent with the administrative, non-adversarial roots of the workers' compensation scheme. The major area of inconsistency lies in the practice of granting equal standing to employers in a worker's appeal. It is recommended that employers be granted intervenor status only (and vice-versa for employer appeals).

The current design of the pre-hearing process, based on an assumption of maximum complexity and a comprehensive approach, has been appropriate to the initial stage of Tribunal development. As the Tribunal matures, it can benefit from its experience and reputation and move toward a pre-hearing process based on an assumption of routine and by dealing with exceptions.

This objective could be achieved, and both major process issues addressed, by a panel-centred pre-hearing process. This process would include a pre-hearing conference of parties and panel member (s) to determine preliminary issues. Use of the entire Board file rather than the current case description file would complement this approach. Advantages would include increased caseload capacity, lower cost per case and greater responsiveness to parties' needs.

The corporate control role of the Tribunal, necessary to ensure consistent treatment and standards, would continue to be exercised, but primarily through panels rather than through staff functions. As WCAT matures, it can begin to relax the high degree of central institutional control appropriate to its early days. Options for redesigning the pre-hearing process may be introduced as pilot projects to test effects and refine proposed procedures.

WCAT's Impact on the Workers' Compensation System

WCAT has been an important influence on the workers' compensation system from its inception. WCAT has been successful in restoring credibility and improving decision-making, and has been a catalyst for reform at the WCB. WCAT has also contributed to the growing role of third-party representation in workers' compensation adjudication, and to the debate over the nature of causality in interpreting the statute.

The issue of who has "the final say" underlies much of the current tension and uncertainty in the workers' compensation system. Sec. 86n of the Act has not proved to be an effective mechanism for resolving fundamental questions of statutory interpretation. A solution to this problem must be found and enshrined in legislation as quickly as possible. Several options exist, including: making either WCAT, WCB or the Ontario Legislature the sole final authority; making WCAT the final authority subject to a formal WCB regulation-making process; implementing the interpretation of Sec. 86n embodied in WCAT Decision 42/89.

PART "B"

12. Significant achievements in the past five years

In the opinion of my colleagues and myself, the Tribunal's significant achievements are as follows:

a. Introduced and enforced the rule of law in respect of workers' compensation benefits, rights and obligations in Ontario.

b. Markedly improved the credibility of the workers' compensation system's adjudicative process in the eyes, particularly, of injured workers. It accomplished this, in my opinion, by truly explaining the reasons for decisions and by being seen to engage in decision-making that is independent of the WCB and of the government, and that is not conflicted - as was the previous internal final appeal process of the WCB - by any competing responsibilities for setting and collecting employer assessments.

   (See as particularly interesting evidence in this respect the government's reliance, in the 1988/89 political debate over the Bill 162 amendments, on the availability of the Tribunal appeals process as credible reassurance to workers concerned about the extent of Board discretion implicit in the adjudication of wage-loss issues.)

   (See also the marked reduction in workers' compensation complaints to the Ombudsman. In 1985/86, workers' compensation complaints totalled 419 and in 1989/90, they totalled 58. Since 1985, the Tribunal has been the subject of an Ombudsman's investigation in an average of 68 cases per year. Of these, only two or three per year have been considered by the Ombudsman to have been unreasonable, and only one has been referred to the Standing Committee. The latter case was withdrawn from the Committee by the Ombudsman before a determination could be made.)

c. Earned the grudging respect of the majority of the employer community for competent adjudication. This is, I believe, true even though in respect of compensation benefits the employer community instinctively prefers the clash of influence buttressed by economic considerations over the rule of law, and it sometimes holds the Tribunal, rather than the 1985 legislative amendments, responsible for the recent ascendancy of the latter.

d. Commenced and sustained the delivery of carefully considered, fully reasoned, competent, fair and objective decisions which made the basis for the Tribunal's conclusions clear and which were reasonably consistent one with the other.

e. Through the publication of such decisions and by the establishment of a Library and the creation and maintenance of data bases, indexes and other tools for readily accessing those decisions, provided the worker and employer communities, the government and the members of the Legislature, with accessible, detailed and usable information about the complexities and mysteries of the workers' compensation system. This is information which had previously only been available, if at all, to WCB administrators.

f. Through its published and accessible, detailed and fully reasoned decisions, made the development in Ontario of expert and effective advocacy in workers' compensation matters possible. It thus ensured the system's accountability, as well as opening its development to the uniquely effective influences of informed, expert, partisan advocacy.

g. Through the same decisions, gave individual workers and employers the possibility of being represented in their cases by partisan advocates equal in understanding and expertise to the adjudicators. And, for the first time in Ontario, made it possible to assess and enforce the workers' compensation system's compliance in particular cases with the fundamental principle that like cases should receive like treatment.

h. Created a fair and open appeals process that was respectful of both workers and employers and their submissions and was not more intimidating to individual workers and employers than was unavoidable, given the seriousness and the inescapable complexity of the undertaking.

i. Demonstrated the advantages of a collegial system of tripartite decision-making.

j. By its very existence, influenced the WCB adjudicators to make more fully considered and therefore better decisions.

k. By not allowing the opinion of WCB doctors to be given special preference over the opinions of outside medical experts, the Tribunal has been responsible for more balanced medical assessments in the system.

l. Influenced the WCB to review its interpretation of the law and/or the medical evidence in respect of a number of compensation issues, perhaps most notably with respect to the compensability in law of chronic pain cases (thus removing one of the significant sources of alienation within the system).

m. Established and maintained the respect and cooperation of the medical profession in Ontario, thus ensuring the Tribunal's access to high quality medical advice and the availability to the Tribunal of appropriate medical evidence. The most tangible evidence of this is the highly qualified roster of medical assessors which the Tribunal has attracted to its service.

n. Maintained an arm's length but constructive working relationship with the WCB and earned the respect of that organization sufficient for the continuation of that relationship at a successful level. This was accomplished notwithstanding the Tribunal's highly sensitive role of supervising and criticizing the WCB's adjudicative decisions and the interpretations of the Act on which the WCB bases its policies.

o. Substantially eliminated the backlogs inherited at the time of the Tribunal's creation, and, with some notable exceptions, rendered most decisions in a generally timely manner.

p. Established new models of adjudicative structures and procedures for administrative agencies in Ontario.

13. <u>Opportunities for cost recovery or revenue</u>

See the answer to Question No. 8.

14. Other agencies who do the same or similar work

The WCB is, of course, such an agency.

Other agencies who also adjudicate personal injury compensation claims include:

Merchant Seamen's Compensation Board

Criminal Injuries Compensation Board

Insurance Commission (personal injuries arising from automobile accidents)

Social Assistance Review Board (Disability Benefits)

Human Rights Commission (in respect of claims for discrimination on the basis of disability)

Canada Pension Plan

Unemployment Insurance Commission

The Tribunal's new jurisdiction concerning injured workers' rights to reinstatement in employment (Bill 162) presents workplace issues not previously dealt with by the Tribunal. Some of these are also the traditional business of other adjudicators, such as: grievance arbitrators, Canada Labour Code arbitrators, the Labour Relations Board, the Office of Adjudication and the Human Rights Commission.

15.(a) Potential for combining agencies

A case could be made, I believe, for the creation of one agency dealing with final appeals from all first-instance adjudication of claims or charges concerning alleged breaches of statutory obligations occurring in or affecting the workplace. These would include decisions under the Employment Standards Act, the Occupational Health and Safety Act, the Workers' Compensation Act, and the Human Rights Code as it applies in the workplace.

A case could also be made for one agency dealing with final appeals from all first-instance adjudications of issues concerning personal injury compensation.

I doubt, however, that one could document a concrete case for significant short-term cost savings in respect of either proposal. It would relieve the courts of some of their current appeals business and introduce some economies of scale. But the major justification for such omnibus appeals agencies would be consistency, avoidance of overlapping jurisdiction, and concentration of expertise and experience.

Of course, the overall adjudication burden of all agencies dealing with personal injury claims would be substantially reduced by the introduction of a universal personal injury compensation plan which would eliminate the need to adjudicate issues concerning the cause of an injury.

15.(b) Is the agency's area so specialized as to support a unique agency?

Absent a universal personal injury compensation plan, the answer, in my opinion, is yes.

The question one might expect in this context is whether the existence of the Appeals Tribunal can continue to be justified in light of the fact that it may be said to be duplicating adjudication performed by the WCB. However, the widespread and deep-seated dissatisfaction with the WCB's previous, internal appeals process, which spawned the idea of an external appeals process in the first place, continues, in my view, to be compelling evidence of the need for the Appeals Tribunal. The essential problem with the Board in the role of final adjudicator of benefit issues - the problem which, in my opinion, ultimately explains the depth of the worker community's dissatisfaction with that system - is that there is an inescapable and fundamental conflict of interest between that role and the Board's responsibilities to the government and the employer community for setting employer assessment rates and collecting assessments.

For other options, see No. 15(a).

16. Delays within the control of other groups active within the agency's mandate

Time devoted in the appeals process to activities whose timeliness is under the control and direction of other groups include:

- Time spent by workers or employers arranging or waiting for professional representation or advice from the Office of the Worker Adviser, Community Legal Services Clinics, the Office of Employer Adviser, lawyers or consultants.

- Time spent by the WCB in delivering its files to the Tribunal.

- Time spent by the Tribunal in settling hearing dates and waiting for the selected dates to come up, where the selection of dates is subject to agreement by the parties' representatives.

- Time spent by the WCB in responding to directions in the Tribunal's referrals of cases back to the WCB for completion of further investigations or for decisions on other issues.

- Time spent in obtaining appointments for further specialist medical examinations, and in waiting for the examination date to arrive, and time spent by the specialist in preparing his or her report.

- Time spent, post hearing, by workers' representatives in obtaining worker consents for further medical examinations or further access to medical records as directed by the hearing panel.

- Time taken by the Board in implementing a Tribunal decision.

17. Agency's use of ADR mechanisms

As usual, in the Tribunal's circumstances the question does not lend itself to a simple yes or no answer.

Traditional mediation techniques are used in respect of three peripheral matters: worker objections to employer-ordered medical examinations under section 23 of the Act (previously section 21); worker objection to employer access to WCB file documents in appeals to the Tribunal, and worker appeals of WCB decisions ordering employer access to file documents under section 71 (previously 77) of the Act.

Because of the Quebec Workers' Compensation Appeals Tribunal's recent positive experiences with mediation techniques as part of the main stream of its process, we are also currently re-examining the possible use of mediation techniques in dealing with substantive appeal issues. However, there are a number of implicit obstacles which would seem to make any negotiation-based settlement process somewhat problematic. These are described below in response to Question No. 18.

But one of the important potential values of even an unsuccessful mediation process is the opportunity it provides for clarification. It can identify unforeseen preliminary obstacles, such as incipient jurisdiction issues, and ensure that the parties to the case understand what the real issues are and what evidentiary requirements will have to be met if they are to have a reasonable chance of seeing the process through to a favourable decision.

With such matters all made clear in advance of the hearing, inappropriate proceedings are identified and withdrawn, unnecessary delays or adjourned hearings are avoided, and the efficient use of hearing time is assured.

In pursuit of these latter goals the Tribunal has always had pro-active strategies. The preparation of the Case Description and its distribution to the parties prior to the hearing, and the pre-hearing preparatory activities of the Tribunal's Medical Liaison Office, and of Tribunal counsel, all as described in the response to Question No. 7, are just such strategies.

The Tribunal has also resorted increasingly to pre-hearing conferences. These are meetings between the parties, Tribunal counsel and the hearing panel. They are held in difficult cases for the purpose of ensuring, well in advance of the hearing date, that there is nothing standing in the way of the efficient use of the hearing time, and that the need for a hearing on the scheduled date - or at all - as well as the detailed agenda for that hearing date, is clear.

The Tribunal is currently experimenting with procedures designed to encourage the increased use of the pre-hearing conference, initially with respect particularly to out-of-Toronto hearings.

Where questions about a case arise pre-hearing at a time when the hearing panel has not been designated, the questions can be referred by Tribunal Counsel to a panel assigned for the special purpose of dealing with such questions. These panels are known as "case direction panels".

18. The difficulties with mediation

The difficulties in implementing a formal mediation process for substantive appeal questions include the following:

a. The statutory restriction on a worker's right to waive or assign rights under the Act.

b. The statutory requirement that the Tribunal decide cases "on their real merits and justice" and, as well, that it give "full opportunity" for a hearing.

c. The absence of the WCB from the appeals process.

d. The frequent non-participation of the employer in the proceedings.

All of these seem to present potentially significant obstacles to the negotiation of settlements as typically contemplated by a mediation process.

We also need to be aware of the inherent dangers in introducing a negotiation element into the rights determination process under a workers' compensation system. Injured workers are by definition particularly vulnerable to negotiation pressures.

19. Rights of appeal - is the agency's decision final?

There is no right to appeal Tribunal decisions. They are said to be final and are protected by a standard privative clause.

Decisions may be "reconsidered" by the Tribunal, but only if the Tribunal considers it "advisable" to do so. The Tribunal has developed criteria of "advisability" which limits the re-opening of decisions to exceptional circumstances. Final decisions have been re-opened in only a handful of cases.

Decisions may be reviewed by the Divisional Court in an application for judicial review in which the Court asks (so far at least): Is the Tribunal's decision "patently unreasonable"? Since 1985 there have been 29 applications for judicial review. Twenty-two of these have been heard and dismissed. Seven are still pending but of these only three are being actively prosecuted.

A complaint about a Tribunal decision may be made to the Ombudsman who will investigate and advise the Tribunal if she thinks the decision is unreasonable or was the subject of an unreasonable process. The Tribunal treats such advice as notionally a request for reconsideration and applies the same standard for re-opening such decisions as it applies to any request for reconsideration. I believe three cases have been re-opened and considered again as a result of this process, and there are a few still under consideration.

20. Caseload Analysis

(1) Number of cases received

In 1991, the Tribunal received 1552 cases and it disposed of 1758 cases. A breakdown according to case type is set out in Tables 1 and 2 attached.

(2) Number of cases settled/withdrawn prior to hearing

In 1991, 797 cases were closed prior to hearing. A breakdown according to case type is set out in Table 3. The number settled/withdrawn during a hearing without a decision is negligible.

(3) Number of cases heard and average case length

The Tribunal heard 1,085 cases in 1991. To do this it held 1,168 hearings. Thus each case took, on average, 1.08 hearings. The ".08" figure reflects the fact that some cases require interim hearings before the final hearing. Pre-hearing conferences, for instance, are counted as hearings for these purposes.

The 1,168 hearings utilized 1,243 hearing days, for an average of 1.06 hearing days per hearing. It is important to note, however, that we do not break hearing time down into hours, so that a one-hour hearing is recorded as a one-day hearing. Since our experience is that most hearings are completed in under 4 hours, the ".06" is not indicative of the average case requiring part of a second day but of a small number of cases requiring more than one day.

A breakdown by case type is set out in Table 4.

(4) Time between file receipt and first day of hearing

The average time between WCB file receipt and the first day of hearing for cases heard in 1991 was 236 calendar days. The median time, however, was 175 calendar days.

This time includes all time required for preparation of the case and hearing materials by the CD writers, MLO and Tribunal counsel (including the gathering of additional medical evidence where necessary); the time required for clarifying communications with the parties or their representatives; the time required to litigate employer access to file documents where workers decline to consent to employer access; the time the Scheduling Department spends in reaching agreement on a hearing date; the time awaiting hearing after the hearing date is agreed upon; and further waiting time occasioned by last minute adjournments of agreed hearing dates (11.5 per cent of scheduled hearing dates are adjourned - or the cases withdrawn - on the eve of the scheduled date, at the request of one of the parties).

(5) Time between file receipt and final disposition

For cases completed in 1991, the overall average time of completion is 316 days.

There is, however, a wide range of complexity and difficulty among the cases, and a better indication of the typical experience of the average applicant may be seen in the median figures. The median completion time for cases completed in 1991 is 218 days. The median figures broken down by appeal types may be found in Table 5.

The average time it took cases to move through each stage of the process during 1991 is another indication of the pace at which typical cases may be expected to move through the Tribunal's processes. This data is as follows:

Processing Stages	A case's average stay in each stage
Preparation for TCO	18 days
Pre-hearing preparation	40 days
Scheduling activity	48 days
Waiting for hearing date and completing hearing	60 days
Decision-making process	60 days
Total	226 days - 7.5 months

It should be noted that the 60 days for the decision-making process includes the time taken for post-hearing investigations. These are found to be necessary in about 22 per cent of the cases.

The time that cases take to be completed in the courts has been the subject of much recent publicity. It may therefore be of interest to note that if the Tribunal were doing only what the courts do - that is, the last two elements on the above list - it would be accomplishing that role in about four months on average, from start to finish.

TABLE 1

ABC REVIEW QUESTIONNAIRE

ANNUAL BREAKDOWN OF INPUT OF CASES

INPUT BY TYPE	1985 Number	(%)	1986 Number	(%)	1987 Number	(%)	1988 Number	(%)	1989 Number	(%)	1990 Number	(%)	1991 Number	(%)	TOTAL Number	(%)
S86o	90	8.5	272	13.0	115	6.5	78	5.0	46	2.8	44	2.9	30	1.9	675	6.0
S15	35	3.3	108	5.2	101	5.7	89	5.7	89	5.5	120	7.9	127	8.2	669	6.0
S21	5	0.5	56	2.7	79	4.5	82	5.2	66	4.1	52	3.4	65	4.2	405	3.6
S77	1	0.1	174	8.3	299	17.0	257	16.5	295	18.2	279	18.4	318	20.5	1623	14.5
S77(Object)	4	0.4	20	1.0	14	0.8	10	0.6	10	0.6	9	0.6	0	0.0	67	0.6
Special Section	135	12.8	630	30.2	608	34.5	516	33.0	506	31.3	504	33.2	540	34.8	3439	30.8
Pension	144	13.7	200	9.6	118	6.7	45	2.9	40	2.5	21	1.4	2	0.1	570	5.1
Commutation	1	0.1	3	0.1	24	1.4	38	2.4	35	2.2	16	1.1	6	0.4	123	1.1
Employer Assess.	10	0.9	30	1.4	17	1.0	33	2.1	26	1.6	26	1.7	5	0.3	147	1.3
Entitlement	703	66.7	1073	51.4	831	47.1	709	45.4	689	42.6	748	49.2	786	50.6	5539	49.6
Reinstatement	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	0.1	31	2.0	32	0.3
Voc Rehab	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	0.1	1	0.0
Ent. & Other	858	81.4	1306	62.5	990	56.2	825	52.8	790	48.8	812	53.4	831	53.5	6412	57.5
Judicial Review	0	0.0	3	0.1	6	0.3	4	0.3	2	0.1	10	0.7	4	0.3	29	0.3
Ombuds. Request	0	0.0	11	0.5	60	3.4	84	5.4	108	6.7	82	5.4	63	4.1	408	3.7
Reconsideration	1	0.1	24	1.1	50	2.8	75	4.8	102	6.3	81	5.3	84	5.4	417	3.7
Clarification	0	0.0	0	0.0	1	0.1	2	0.1	1	0.1	0	0.0	0	0.0	4	0.0
Post Decision	1	0.1	38	1.8	117	6.6	165	10.6	213	13.2	173	11.4	151	9.7	858	7.7
No Jurisdiction	60	5.7	114	5.5	48	2.7	56	3.6	110	6.8	31	2.0	30	1.9	449	4.0
TOTAL INCOMING	1054		2088		1763		1562		1619		1520		1552		11158	

TABLE 2

ABC REVIEW QUESTIONNAIRE

ANNUAL BREAKDOWN OF DISPOSITION OF CASES

INPUT BY TYPE	1985 Number	(%)	1986 Number	(%)	1987 Number	(%)	1988 Number	(%)	1989 Number	(%)	1990 Number	(%)	1991 Number	(%)	TOTAL Number	(%)
S86o	1	10.0	58	9.0	235	13.2	125	6.2	121	6.0	56	3.5	53	3.0	649	6.6
S15	0	0.0	26	4.0	144	8.1	99	4.9	79	3.9	118	7.4	107	6.1	573	5.8
S21	0	0.0	29	4.5	88	4.9	87	4.3	73	3.6	46	2.9	66	3.8	389	4.0
S77	0	0.0	41	6.4	348	19.5	288	14.3	230	11.4	298	18.7	305	17.3	1510	15.4
S77(Object)	0	0.0	1	0.2	24	1.3	15	0.7	7	0.3	9	0.6	5	0.3	61	0.6
Special Section	1	10.0	155	24.0	839	47.0	614	30.4	510	25.3	527	33.1	536	30.5	3182	32.4
Pension	0	0.0	7	1.1	19	1.1	91	4.5	123	6.1	100	6.3	168	9.6	508	5.2
Commutation	0	0.0	0	0.0	7	0.4	26	1.3	46	2.3	29	1.8	10	0.6	118	1.2
Employer Assess.	0	0.0	8	1.2	18	1.0	26	1.3	24	1.2	28	1.8	22	1.3	126	1.3
Entitlement	6	60.0	323	50.1	778	43.6	1096	54.3	1015	50.3	684	43.0	788	44.8	4690	47.7
Reinstatement	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4	0.2	4	0.0
Ent. & Other	6	60.0	338	52.4	822	46.1	1239	61.4	1208	59.9	841	52.9	992	56.4	5446	55.4
Judicial Review	0	0.0	0	0.0	3	0.2	2	0.1	5	0.2	4	0.3	8	0.5	22	0.2
Ombuds. Request	0	0.0	1	0.2	17	1.0	53	2.6	82	4.1	102	6.4	110	6.3	365	3.7
Reconsideration	0	0.0	5	0.8	39	2.2	52	2.6	103	5.1	82	5.2	74	4.2	355	3.6
Clarification	0	0.0	0	0.0	0	0.0	3	0.1	0	0.0	1	0.1	0	0.0	4	0.0
Post Decision	0	0.0	6	0.9	59	3.3	110	5.4	190	9.4	189	11.9	192	10.9	746	7.6
No Jurisdiction	3	30.0	146	22.6	64	3.6	56	2.8	108	5.4	34	2.1	38	2.2	449	4.6
TOTAL DISPOSED	10		645		1784		2019		2016		1591		1758		9823	

TABLE 3

ABC REVIEW QUESTIONNAIRE

ANNUAL BREAKDOWN OF DISPOSITION OF CASES
Cases That Were Closed Without Hearings (1)

INPUT BY TYPE	1985 Number	(%)	1986 Number	(%)	1987 Number	(%)	1988 Number	(%)	1989 Number	(%)	1990 Number	(%)	1991 Number	(%)	TOTAL Number	(%)
S86o	1	11.1	16	4.5	51	9.0	27	4.1	48	6.2	15	2.6	17	2.1	175	4.7
S15	0	0.0	14	3.9	72	12.7	38	5.8	41	5.3	63	11.1	55	6.9	283	7.6
S21	0	0.0	29	8.1	67	11.9	59	9.1	49	6.3	29	5.1	37	4.6	270	7.2
S77	0	0.0	28	7.8	100	17.7	110	16.9	102	13.1	115	20.2	154	19.3	609	16.3
S77(Object)	0	0.0	0	0.0	5	0.9	6	0.9	4	0.5	7	1.2	5	0.6	27	0.7
Special Section	1	11.1	87	24.3	295	52.2	240	36.9	244	31.4	229	40.2	268	33.6	1364	36.6
Pension	0	0.0	7	2.0	17	3.0	43	6.6	44	5.7	34	6.0	130	16.3	275	7.4
Commutation	0	0.0	0	0.0	1	0.2	6	0.9	10	1.3	2	0.4	1	0.1	20	0.5
Employer Assess.	0	0.0	5	1.4	7	1.2	11	1.7	8	1.0	8	1.4	6	0.8	45	1.2
Entitlement	5	55.6	110	30.7	139	24.6	226	34.7	268	34.5	151	26.5	227	28.5	1126	30.2
Reinstatement	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2	0.3	2	0.1
Ent. & Other	5	55.6	122	34.1	164	29.0	286	43.9	330	42.5	195	34.2	366	45.9	1468	39.4
Judicial Review	0	0.0	0	0.0	3	0.5	2	0.3	5	0.6	4	0.7	8	1.0	22	0.6
Ombuds. Request	0	0.0	1	0.3	17	3.0	53	8.1	82	10.6	102	17.9	110	13.8	365	9.8
Reconsideration	0	0.0	2	0.6	23	4.1	15	2.3	9	1.2	6	1.1	7	0.9	62	1.7
Clarification	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Post Decision	0	0.0	3	0.8	43	7.6	70	10.8	96	12.4	112	19.6	125	15.7	449	12.0
No Jurisdiction	3	33.3	146	40.8	63	11.2	55	8.4	107	13.8	34	6.0	38	4.8	446	12.0
TOTAL DISPOSED	9		358		565		651		777		570		797		3727	

(1) These cases may have involved one or more rounds of scheduling.

TABLE 4

ABC REVIEW QUESTIONNAIRE

ANALYSIS OF CASES HEARD
For Full Time & Part Time Vice Chairs
By Appeal Type in 1991

APPEAL TYPE	SCHEDULING DATES	HEARING DAYS	HEARINGS	CASES HEARD
FULL TIME (71% of 1991 Hearings)				
Section 15	n/a	43	41	38
Section 21	n/a	13	13	13
Section 77	n/a	67	67	66
Section 86o	n/a	20	20	20
Entitlement/Other	n/a	701	634	573
Reconsideration	n/a	58	64	58
SUBTOTAL	n/a	902	839	768
PART TIME (29% of 1991 Hearings)				
Section 15	n/a	25	19	17
Section 21	n/a	9	9	9
Section 77	n/a	94	93	91
Section 86o	n/a	11	11	11
Entitlement/Other	n/a	191	186	178
Reconsideration	n/a	11	11	11
SUBTOTAL	n/a	341	329	317
TOTAL	1368	1243	1168	1085

The break-down of scheduling dates achieved by type of Vice Chair is not available.
Reconsideration requests are considered 'hearings' in this analysis. Some involve threshold as well as merits issues.
Each case heard in a S.77 hearing session is counted separately.

TABLE 5

ABC REVIEW QUESTIONNAIRE

ANALYSIS OF APPEALS COMPLETION TIME
(Time of File Receipt to Formal File Closing)
By Appeal Type in 1991

APPEAL TYPE	MEDIAN TIME (1)	NUMBER OF CASES COMPLETED
Section 15	161	(107)
Section 21	84	(66)
Section 77	122	(310)
Section 86o	226	(53)
Pension (2)	n/a	(168)
Commutation	265	(10)
Employer Assessment	346	(22)
Entitlement/Other	299	(788)
Reinstatement	139	(4)
Judicial Review (3)	n/a	(8)
Ombudsman (4)	n/a	(110)
Reconsideration	168	(74)
Non Jurisdictional	25	(38)
TOTAL	218	1434

1. The median age is calculated in calendar days from the time the relevant file is given to WCAT from The WCB, and runs until the file is formally 'closed'. The median represents the value at which half of the observations are above and half are below.
2. Although there were 168 pension cases closed, most of these were for very old cases that had been inactive for long periods of time following their reassignment for review of the chronic pain issue at the WCB. Providing the age of these pension cases might be misleading.
3. Ages are not given for the 8 Judicial Review cases, because the time frame for completion is not in WCAT's control.
4. Ages are not given for the 110 Ombudsman Review cases, because the time frame for completion is not in WCAT's control.

21. The Backlog Question

If the question is whether there are cases piled up at the Tribunal's door which the Tribunal isn't getting to, the answer is no. We are able to deal with cases as they come in.

But the question, of course, is not that simple.

In responding to an inquiry about backlogs it is important that the terminology be clear. If one conceives of the Tribunal's process as a pipeline, then a backlog is caused by unplanned or undesirable constrictions at various places in the pipeline. And if there are no constrictions of that nature, there is no backlog, even though the pipeline will be full of uncompleted cases at various stages of completion. The number of cases that would be in the pipeline if there were no unplanned or undesirable constrictions is, in my terminology, the Tribunal's workload, and the number of cases that are there because of such constrictions is the Tribunal's backlog. The backlog and the workload together comprise the inventory of cases at the Tribunal.

The Tribunal's inventory of cases totalled 1,335 at the end of 1991. This contrasts with 1,541 at the end of 1990, 1,612 at the end of 1989 and 2,009 at the end of 1988. This steady reduction has been achieved in a period when the incoming caseload has been about the same each year.

Deciding whether cases are in the pipeline only because of unplanned or undesirable constrictions is a judgement call on a number of levels.

First, all processes have planned constrictions that are considered desirable or at least acceptable. These consist on the one hand of the process elements themselves as they have been selected and designed by the process designers and, on the other, the reasonable limitations on the resources available to operate such elements.

Thus, the creation of an external appeals tribunal extended the time it takes to finally complete a workers' compensation case, and the limitation on the resources made available to the Tribunal determined ultimately the length of that extension. A Tribunal example at a less macro level would be the Tribunal's pre-hearing review of the sufficiency of the medical evidence in the file. The time it takes to do that review extends the time it takes to complete the appeal, and the number of staff employed on the review determines the length of the extension.

Whether the reasons for the review justify adding any additional time to the appeal process and, if they do, how much time - and therefore what limitations on the resources applied to the review are warranted - are, like the question about the existence of the Tribunal, questions on which reasonable people may differ. Answers to these questions require personal judgements about what constitutes an adequate adjudicative process and about how the needs of such a process can be most efficiently and effectively met and about how much time it is reasonable or fair to devote to the process. Furthermore, they assume the availability of such funding as can be demonstrated to be necessary for the efficient operation of the process which has been judged adequate and effective.

The various elements of the Tribunal's process are always under review and are subject to continual adjustments in response to the Tribunal's developing experience. The experiment with increased use of pre-hearing conferences in out-of-Toronto cases is a current example. But at this point of time, the process elements and the resources we are applying to those elements reflects my colleagues' and my best judgement as to what is necessary to perform the Tribunal's assignment within an acceptable time frame.

There is also, then, the question of whether the agreed upon resources are being applied to the accepted elements as efficiently as possible. Could a particular element of the process be done faster by organizing and managing it better. Thus is it necessary for the pre-hearing work to take on average 40 days, or with better organization could it be done in 30? In 20? Again, this is question of judgement.

For anyone who disagrees with these judgements, the number of cases in the pipeline that, in their opinion, wouldn't be there if there were a different process design - if we didn't, for example, do a pre-hearing review of medical evidence - or if there were a bigger budget, or if the system were organized and managed better, will be fairly regarded as backlog.

As will be seen from the answers to question #20, it currently takes a not unusual case about 7.5 months on average to make its way through the Tribunal's process from beginning to end. In 1985, when the Tribunal's process was first being planned, the goal of an average six-month turnaround time was regarded as appropriate. In 1988, the Tribunal Chair accepted the then Minister of Labour's request that the goal for the average turnaround time be reduced to four months. But here we are at the end of 1991 experiencing a turn-around time of 7.5 months.

Thus, if our own 1985 judgement were still considered sound, we would say that the Tribunal was currently running about 1.5 months behind our goal, or that we had a "backlog" of about 267 cases (1.5/7.5 of the December 1991 inventory). If the 1988 goal of four months is still considered a reasonable goal, our "backlog" is about 623 cases.

It is my own view, that the Tribunal's process design has demonstrated its validity and there are no elements of the present design which are not necessary to the accomplishment of the Tribunal's role as it is defined by the statute.

As far as the efficiency of the operation is concerned, I still think it may be possible to reduce the average turn-around time perhaps to about seven months. We will know better after we have had the assistance of the new case tracking system for a few months.

However, barring a substantial budget increase, six months or four months can now both be seen, in my view, to be unrealistic goals. Indeed, given that almost four months of time is typically devoted to negotiating a hearing date with the parties and then waiting for the agreed hearing date, neither goal would be feasible even with additional resources without reverting to arbitrary hearing dates - an approach that has been proven not to be acceptable to the parties or their representatives.

If a seven-month average turnaround time turns out to be reasonable, then we are currently running a backlog, overall, of about 89 cases.

One area in which there is clearly evidence of a backlogged situation is decision-writing. The overall result of producing decisions within 60 days on average is not, given the increasing complexity of the cases the Tribunal is hearing, significantly out of line, if at all. However, we continue to have what seems to be an irreducable batch of particularly old cases that take over 12 months to complete after they reach a ready-to-write status. The number of these are not large in the overall scheme of things, and they are inevitably highly complicated and difficult cases which may be expected to take several months to complete in the best of circumstances, but I continue to think that this batch of cases is larger than is necessary and we continue trying to bring the writing of these cases under better control.

22. Number of adjudicators and their caseloads

The Tribunal Chair and the Alternate Chair each carry a hearing caseload that together is the equivalent of about 3/4 of a full-time Vice-Chair.

In addition to the Chair and Alternate Chair, the Tribunal has:

Vice-Chairs (i.e. Panel Chairs):	10 full time
	11 part-time
Panel Members:	14 full-time
	12 part-time

The 1991 caseload breakdown for full and part-time vice-chairs is set out in Table 6 attached.

The typical annual caseload of Tribunal vice-chairs and members can be measured in terms of hearing days. Because there is a written appeal record (usually an extensive WCB file) and that written record contains much of the evidence which will be considered, each appeal or application is usually heard within one day. In almost all cases, a written decision will issue after the day of hearing. Thus, the number of "hearing days" is usually a fairly good measure of the caseload both in terms of volume of cases, actual hearing days, and decision-writing/release requirements.

Full-time vice-chairs are assigned about 100 hearing days per year. The actual number of hearing days per vice-chair is somewhat less than this because of pre-hearing adjournments or withdrawals. In 1991, the average was 87 hearing days per full-time vice-chair.

Full-time members are assigned about 150 hearing days per year but, because of pre-hearing adjournments and withdrawals, the actual number of hearing days is somewhat less. In 1991, the average was 137 hearing days per full-time member.

The typical annual caseloads of part-time vice-chairs varies widely - depending on their experience and availability. It ranged from about 10 to 70 hearing days per part-time vice-chair in 1991.

The average number of hearing days per part-time member was 41 in 1991.

TABLE 6

ABC REVIEW QUESTIONNAIRE

ANALYSIS OF HEARINGS AND HEARING DAYS
For Full Time & Part Time Vice Chairs
By Appeal Type in 1991

APPEAL TYPE	CASES HEARD	HEARING DAYS	AVERAGE HEARING DAYS PER CASE HEARD
FULL TIME (71% of 1991 Hearings)			
Section 15	38	43	1.13
Section 21	13	13	1.00
Section 77	66	67	1.02
Section 86o	20	20	1.00
Entitlement/Other	573	701	1.22
Reconsideration	58	58	1.00
SUBTOTAL	768	902	1.17
PART TIME (29% of 1991 Hearings)			
Section 15	17	25	1.47
Section 21	9	9	1.00
Section 77	91	94	1.03
Section 86o	11	11	1.00
Entitlement/Other	178	191	1.07
Reconsideration	11	11	1.00
SUBTOTAL	317	341	1.08
TOTAL	1085	1243	1.15

There were 1386 Scheduling Dates Arranged in 1991. This includes the 69 panel assignments for Reconsideration cases.
There were 1243 Hearing Days in 1991.
There were 1168 Hearings in 1991.
There were 1085 Cases Heard in 1991.
Each Reconsideration case is counted as a hearing.
Each case heard in a S.77 hearing is counted one hearing.

23. <u>Savings potential in changing the proportion of part-time adjudicators?</u>

The Tribunal's 1991 expenditure on per diems for part-time adjudicators was $460,000. The 1991 cost of salary and benefits for full-time adjudicators was about $1,900,000.

Our data on what we bought for our expenditure on part-time adjudicators is not, however, easily interpreted. We know that 29 per cent of the tribunal's total cases in 1991 were assigned to part-time vice-chairs. On the other hand, 43 per cent of the worker or employer member adjudicative assignments were assigned to part-time members. (We use mixed panels and try not to have an entirely part-time panel in any case.) But a much greater proportion of the interlocutory - and therefore less difficult and time-consuming - cases (such as section 71 appeals) are assigned to part-time vice-chairs than to full-time vice-chairs and we reserve the complex and difficult cases for full-time vice-chairs.

As an educated guess, I would expect that, of all of the adjudicative hours put in by both full-time and part-time vice-chairs and members in preparing for hearings, attending hearings, attending caucuses, and in writing and reviewing draft decisions, somewhere between 20 and 30 per cent would have been done by part-timers. If that is a correct estimate, then if, in 1991, we had paid salaries and benefits to additional full-time adjudicators in place of the per diems we in fact paid to part-time adjudicators, the cost of the work that was done by part-time adjudicators would have been $380,000 to $570,000. This contrasts with the $460,000 that was in fact paid to the part-timers.

There are, of course, cost factors other than per diems and salaries and benefits. For full-time adjudicators, full-time office space must also be provided and this would be a net additional cost since we do not provide office space or computer terminals for part-time members. (When they work at the Tribunal outside of hearing times they are assigned offices of full-time members away on out-of-Toronto trips.) Furthermore, in the Tribunal's present circumstances there is no possibility of adding office space without leasing additional space.

On the other side of the ledger part-time members generally require more administrative support of various kinds.

It would appear that there is negligible potential for significant savings in any adjustment of the proportion of part-time to full-time adjudicators.

24. Single adjudicators v. panels of adjudicators

Appeals Tribunal cases are heard by panels of adjudicators. This is required by statute. The only exception permitted is with respect to decisions directing that workers undergo further medical examinations.

It may be noted, however, that while the statute permits medical examination decisions to be made by vice-chairs acting alone, this has never been contemplated. Additional medical examinations are not frequently thought to be necessary and, when they are, they are routinely arranged on the consent of the worker. Accordingly, an adjudicative direction is rarely required. When such directions are found to be necessary, they are issued by a tripartite case direction panel or, more usually, by the hearing panel itself.

The experience of the Tribunal's adjudicators with tripartite adjudication at the Tribunal have led them - the Chair, vice-chairs and members alike - to think highly of the value of tripartite decision-making - especially in a workers' compensation context. Thus, even if the statute permitted the use of single adjudicators I would expect to find strong resistance to their use from all corners of the Tribunal. And I personally would share the reluctance to give up the very important advantages offered in this context by tripartite decision-making.

The tripartite panel comprised of individuals with very different backgrounds and perspectives, who come to the decision-making process prepared to put aside the role of partisan advocate and to genuinely consider with there colleagues the right answer in the case, offers many advantages. One, which is not often mentioned in the literature on this topic, but which I have come to recognize as very important, is the jury-like role that the three members play in respect of many of the factual and medical issues.

I believe that the quality and sensitivity of the Tribunal's decisions and the Tribunal's credibility, particularly with workers, are attributable in significant measure to the Tribunal's collegial, tripartite decision-making.

25. Ratio of support staff to adjudicators

For purposes of determining this ratio, I have assumed that including the number of part-time adjudicators on a straight-up basis would be misleading. I have, accordingly, converted the part-time roster into full-time equivalents by using as a conversion factor the proportion of the number of cases dealt with by part-time vice-chairs in 1991 - 29 per cent rounded off to 30 per cent. As indicated previously, this is not fairly indicative of the proportion of the Tribunal's actual adjudicative work done by part-time adjudicators but the number of actual cases assigned to vice-chairs does have a reasonable connection to the commitment of administrative support services.

Calculated on this basis, the number of adjudicators, including the part-time full-time equivalents, and including in this instance the Chair and the Alternate Chair, is 33.

As noted previously, the number of staff is 102.

The ratio is, therefore, 3.1 to 1.

When this ratio is compared with other adjudicative agencies it will be important to do so with agencies also exercising an inquisitorial, adjudicative function.

26. Hearing rooms

We have in the Tribunal's offices in Toronto four of our own rooms dedicated as hearing rooms, and a conference room that is also used as a hearing room on occasion. For hearings out of Toronto, the Tribunal rents hotel meeting rooms.

We schedule hearing dates in Toronto at the rate of about 900 hearings per year. We estimate a utilization rate for the hearing rooms of about 85 per cent on available days. This will fall off substantially in parts of July and August and again in December and January.

27. Out-of-Toronto hearings - costs

The Tribunal holds hearings in London, Windsor, Thunder Bay, Sault Ste. Marie, Timmins, Sudbury and Ottawa.

The typical costs may be seen from the following costs of a one-week trip to Sudbury, December 2-6, 1991, during which five cases were heard. During the week we send one vice-chair for the first half of the week and another vice-chair for the second half. The worker and employer Members stay for the whole week.

Hotel invoice:	$1,075.69 (including $350 for hearing room)
Travel:	$1,060.20
Expenses:	$1,328.66
Total:	$3,464.55

It should be noted that had those cases been heard in Toronto the Tribunal would have paid for the travelling and accommodation expenses of the five workers and any witnesses.

28. Hearings in French

The Tribunal provides hearings in French with bilingual adjudicators in any of the locations in which it holds English hearings.

The adjudicators are regular Tribunal adjudicators normally employed in English hearings, so that there is no extra costs for adjudicators.

It is usual to employ an interpreter in such hearings for the benefit of any party or representative who does not speak French. This is an extra cost but one that is not unique to French hearings as interpreters are frequently required in English hearings where parties or witnesses do not speak English.

Translation work is required in preparing some of the hearing documents and in translating the final decision (the decision is written in English and translated, even if the hearing was held in French). It is difficult to isolate this particular cost since it is work that is not contracted to outsiders but is done by the Tribunal's own full-time translator.

The full-time translator is engaged in many other assignments and the number of French hearings is not high, so that it is difficult to apportion costs. They are not in any event significant.

On the salary and benefits of the full-time translator and on outside French translation costs, the Tribunal spent in 1991 a total of $72,000.

29. Adjudicator training

The Tribunal provides the following range of training activities for adjudicators.

For newly appointed adjudicators there is an extensive orientation program over a period about five weeks. This includes structured, small group, or one-on-one instructions; studying a comprehensive selection of training materials; and observing extensively the work of experienced Tribunal adjudicators in hearings and in decision-making caucuses. Trainees are encouraged to ask questions and are assigned a "buddy" for the period of the training to ensure that reticence with strangers will not be an obstacle to seeking answers to questions that come up. New vice-chairs are also asked to write a mock decision in one of the cases they have witnessed, and this is assessed and criticized.

The subjects covered in this period include administrative and process practices of the Tribunal, conflict-of-interest policy, administrative law, evidence law, basic workers' compensation law, medical and legal issues of special concern to the Tribunal, Tribunal history, the Tribunal's Mission Statement and the principles of adjudication to which the Tribunal is committed.

After the training period, new adjudicators are given selective adjudicative assignments, starting with one a week and building over several weeks to a full load. With tripartite hearing panels we have the advantage that new adjudicators are always working on a case with experienced adjudicators who are very willing to share their experience.

New vice-chairs are also required to submit their first 25 draft decisions for review by the Tribunal's draft decision review process.

In addition to this program for new adjudicators, the Tribunal organizes a number of continuing education events for all adjudicators. We present three to four full-day training programs a year at which attendance is mandatory. We also offer four to six optional three-hour programs. In addition, the Training Committee organizes trips to visit industrial plants.

Most importantly, the Tribunal's Assembly meets once a month. Frequently, these meetings discuss substantive law or medical issues of current special concern. These meetings are held for an hour and a half at noon so that all adjudicators can attend unless they are on a out-of-town trip. With respect to law or medical issues, decisions are not reached at these meetings but information and views are shared and everyone's awareness of the nature and dimensions of such issues are enhanced.

The Tribunal produces summaries of all completed decisions which are distributed once a week and these are part of the current reading obligations of all adjudicators. As well, the library produces a weekly compilation of new material of general interest on law and medicine issues which is distributed to each adjudicator.

We also utilize the conferencing capacity of the Tribunal's computer to share new ideas or new questions, new developments, etc.

French language training is made available at the Tribunal once a week during working hours.

In addition to these internal activities, the Tribunal sends adjudicators and staff to a number of annual workers' compensation conferences, including: the Ontario COBA conference in Toronto in November, the CCAT conference in Ottawa in May, the Association of Workers' Compensation Boards of Canada's annual conference in June, and its "college" in the winter; and the IAIABC's college in the U.S. Attendance at these functions is held to two to four or so, with the exception of the COBA conference to which we will typically send about 20 people.

We also encourage our adjudicators and staff to participate in these conferences as presenters or workshop leaders.

The Tribunal's Training Committee meets on a regular basis and is comprises of members representing various functions as well as the worker and employer constituencies.

The costs of these activities are difficult to identify specifically. With few exceptions the internal programs are organized and presented by volunteers either at the Tribunal or in premises such as the MacDonald Block for which we are not charged. Expenses for these programs are usually limited to coffee and muffins at the breaks and sandwiches for lunch. However, for the mandatory training we pay part-time adjudicators their regular per diem and travel expenses. The most recent mandatory training program cost $5,575 in per diems and travel expenses.

The French language training cost $11,649 in 1991.

We have a staff development annual budget of $40,000 which pays for the attendance of staff and adjudicators at continuing education conferences and workshops.

30. Court reporters

Yes, we use court reporters for all of our hearings. The court reporter services cost $115,000 a year. This does not include the cost of transcripts.

We order transcripts after a hearing primarily for purposes of dealing with requests for reconsideration, complaints to the Ombudsman or Judicial Review applications, and, in those cases, only where what transpired at the hearing is relevant to the complaint. The cost of transcripts for Toronto hearings was $27,000 in 1991 and we estimate a cost of about $15,000 for out of Toronto hearings, for a total of $42,000. Parties who order transcripts themselves pay their own costs.

The WCB employs court reporters for its Hearings Officer hearings and we pay for transcripts of those hearings in every case that is appealed. These transcripts cost the Tribunal about $120,000 in 1991.

The statute does not require the use of court reporters. However, our obligations in respect of requests for reconsideration, complaints to the Ombudsman, and judicial review, make the availability of transcripts important. We are currently investigating the practicality and cost of taping hearings.

31. Special issues related to access to the agency by the public

Far and away the biggest obstacle is the difficult and highly complex nature of the legal and medical issues which the workers' compensation system presents in cases that reach the Appeals Tribunal.

The Tribunal does its best to assist people who come to the Tribunal on an appeal or in response to an appeal without professional representation. We will try to make them comfortable and we will work very hard to ensure that their case is dealt with properly. But we strongly encourage people to get competent professional representation. (By which we do not mean a lawyer, but a person, who may be a lawyer, whose business is advocacy in workers' compensation matters and who is competent.)

We encourage representation for two reasons. First, in a subject as complex as this it has been demonstrated again and again that for ensuring that a parties' interests and rights are fully appreciated by a Tribunal panel there is in fact no effective substitute for partisan professional representation. Second, despite continued concentration on simplifying our written decisions, we find it frequently difficult in these complicated cases to communicate the nature of the issues or the reasons for a decision without the assistance of a competent professional representative.

In the past, at least, there seemed to be a tendency to blame the Tribunal for making the subject as complex as it is. But in truth we were just the messenger - the first workers' compensation adjudicators to give reasons for their decisions and thus the first to disclose to the public how difficult and complex the subject is.

Pending the creation of a universal system, I do not believe there is anything to be done by way of simplifying the issues. To compensate for injuries that can be seen to arise out of employment while refusing compensation for other, identical injuries is inherently a complex, difficult and contentious undertaking.

Given this situation, the most important obstacle to the public's access to this Tribunal's services is the limits in the availability of professional advocates. Since about 1987, while the Board's overall claims have gone up, the Tribunal's incoming caseload has remained amazingly flat - 1400 to 1500 cases a year, year in and year out. We at the Tribunal suspect that our caseload is being effectively dampened by the limits on the number of cases that the existing advocacy resources are capable of handling in any given year. In our view, the evidence of the problem of accessing the Tribunal is likely to be found in the waiting lists in the advocacy offices.

I continue to be convinced that the publication of fully reasoned and fully indexed decisions remains the key to the public access that is possible.

32. Sharing of services and resources amongst boards and agencies

It seems obvious to me that there are important economies and other significant advantages to be had in sharing services, expertise and other resources amongst all agencies performing adjudicative functions. There are many aspects and needs of any adjudicative undertaking which are common to any other adjudicative undertakings and there is no justification to limit the sharing to tribunals within one Ministry, except for the problems of administering a program across Ministries.

These advantages will be more important to smaller agencies than to agencies like the Appeals Tribunal, or the Ontario Labour Relations Board which are of a size that permits reasonable self-sufficiency.

The areas of sharing that seem self-evident would include:

a. Training in common subjects and common skills such as: administrative law, evidence law, the common law, legal analysis and legal reasoning, standards of proof and burdens of proof, the legal system and the administrative justice system, adjudicative processes, conducting a hearing, and writing a reasoned decision;

b. Sharing expertise peculiar to an adjudicative undertaking, viz., scheduling, case tracking, computerizing case tracking, out-of-Toronto adjudication, evaluating the performance of adjudicators, expediting decision writing, maintaining consistency across the agency while respecting the autonomy of individual adjudicators, and the appropriate use of agency counsel in the adjudicative process;

c. Sharing common resources such as hearing rooms, investigative services, rosters of medical experts, libraries, computer experts, court reporting services, reception services, etc.

This list also serves to demonstrate the need for Ontario's administrative justice system to be regarded as a system with a system's need for central, system planning and control. No one in Ontario has such a mandate, and it is long past time, in my respectful opinion, that one was assigned. The creation of an Administrative Law Council would be an important beginning.

33. Future consultation

I welcome further consultation in any form. I would prefer to wait to see the product of the Committee's analysis of these questionnaires - that is, the subject matter of further consultation - before suggesting an appropriate process.

34. Suggestions for operational efficiencies and savings within the agency

I found this question to be very difficult.

I have just completed the Tribunal's 1992 budget submission which reflects the Tribunal's and my current efforts in maximizing efficiencies and minimizing our costs. The budget was developed with full awareness of the repressed economic times and of the Government's major commitment to fiscal restraint. It provides, for instance, for no increase over the 1991 budget, even though it is reasonable to expect some increase in caseload in 1992.

We have been always been careful with our financial planning and expenditures at the Tribunal and while, no doubt, I might find another one-half or one per cent savings by exerting extra special control over individual expenditures, it is not possible to go beyond that, in my opinion, without resorting to major changes that would be destructive and alienating - changes that would substantially affect the quality of service provided to the Tribunal's clientele and the quality of its decision-making.

There are two exceptions to this to which I have previously preferred. One, which would require legislative amendment, is for the Tribunal to stop expending its resources on dealing with the large numbers of appeals concerning employer access to workers' medical reports. It is very difficult to sort out what proportion of our resources we are devoting to administering and adjudicating these appeals, but it is in the order of 5 per cent, or $500,000. Appeal rights with respect to decisions on employer access to medical records fall, in my own opinion, into the category of ideal rights which this society can no longer afford.

The other is the elimination of court reporters and transcripts at both the WCB and the Tribunal. This step would save the Tribunal about $300,000 per year.

Being able to obtain a verbatim record of what transpired at a hearing when a dispute arises is valuable. Such records allow the Tribunal management and panels reconsidering cases and the Ombudsman and the courts to see for themselves what went on in the hearing and provide the essential basis for a fully informed resolution of such disputes, to the benefit of all concerned, including the Tribunal.

Taking verbatim records is also an acknowledged traditional feature of a serious hearing, the mere presence of a court reporter contributes implicitly to an atmosphere of serious purpose and to the restraint of conduct which is important to an adjudicative enterprise - from numerous points of view.

The importance attributed by adjudicators to the taking of verbatim records of adjudicative hearings may be seen from the Tribunal's experience in 1988/89 when the Tribunal last reviewed the necessity of continuing to employ court reporters. This subject was reviewed extensively by the Tribunal's financial committee and a recommendation was finally made to the Tribunal's Assembly that the verbatim recording of hearings be dispensed with. This

recommendation was roundly defeated in the Tribunal's full Assembly meeting with the opposition to it coming from virtually all of the by then highly experienced adjudicators - vice-chairs, worker members and employer members alike.

But, in my opinion, we could do without verbatim reporting services without affecting anything of a fundamental nature. The OLRB, for instance, has never used court reporters, and there are many other examples. And in a government-funding environment where hospitals are having to be closed, perhaps it is time to say that verbatim records are also part of an ideal world of adjudication that at least in the administrative justice system we can no longer afford.

The Tribunal is, incidentally, currently exploring the possible transition to the electronic taping of its hearings.

But these are the only two areas of significant savings that I can think of. If the government were to say to me (of course, in our situation it would have to be the WCB) that things are in an apocalyptic state and in 1992 $11 million simply can't be found for the Tribunal, there is only $8 or $9 million. . . I might be able to figure out a way for the Tribunal to stay alive, but it would be at a cost to quality of product and services and to the Tribunal's systemic role and to individuals that would be very serious, indeed.

I have assumed that the Committee will not have expected agency chairs responding to this question 34 to engage in that sort of apocalyptic speculation.

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